

LIBRARY OF CONGRESS

UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

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IN THE MATTER OF:)

) Docket No.

DETERMINATION OF CABLE) 14-CRB-0010-CD

ROYALTY FUNDS) (2010-2013)

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<p style="text-align: right;">4400</p> <p>1 UNITED STATES COPYRIGHT ROYALTY JUDGES 2 The Library of Congress 3 -----X 4 IN THE MATTER OF:) 5) Docket No. 6 DETERMINATION OF CABLE) 14-CRB-0010-CD 7 ROYALTY FUNDS) (2010-2013) 8 -----X 9 BEFORE: THE HONORABLE SUZANNE BARNETT 10 THE HONORABLE JESSE M. FEDER 11 THE HONORABLE DAVID R. STRICKLER 12 13 Library of Congress 14 Madison Building 15 101 Independence Avenue, S.E. 16 Washington, D.C. 17 April 24, 2018 18 19 9:41 a.m. 20 VOLUME XX 21 22 23 Reported by: Joe W. Strickland, RPR, CRR, CRC 24 Karen Brynteson, RMR, CRR, FAPR 25</p>	<p style="text-align: right;">4402</p> <p>1 APPEARANCES (Continued): 2 On behalf of Program Suppliers: 3 GREGORY O. OLANIRAN, ESQ. 4 LUCY HOLMES PLOVNIK, ESQ. 5 ALESHA M. DOMINIQUE, ESQ. 6 ALBINA GASANBEKOVA, ESQ. 7 DIMA BUDRON, ESQ. 8 Mitchell Silberberg & Knupp LLP 9 1818 N Street, N.W., 8th Floor 10 Washington, D.C. 20036 11 202-355-7917 12 13 On behalf of Public Television Claimants: 14 RONALD G. DOVE, Jr., ESQ. 15 DUSTIN CHO, ESQ. 16 ROBERT N. HUNZIKER, JR., ESQ. 17 Covington & Burling LLP 18 One CityCenter 19 850 Tenth Street, N.W. 20 Washington, D.C. 20001 21 202-662-4956 22 23 24 25</p>
<p style="text-align: right;">4401</p> <p>1 A P P E A R A N C E S: 2 On behalf of Joint Sports Claimants: 3 ROBERT ALAN GARRETT, ESQ. 4 M. SEAN LAANE, ESQ. 5 DANIEL A. CANTOR, ESQ. 6 MICHAEL KIENTZLE, ESQ. 7 BRYAN L. ADKINS, ESQ. 8 Arnold & Porter Kaye Scholer LLP 9 601 Massachusetts Avenue, N.W. 10 Washington, D.C. 20001 11 202-942-5000 12 13 IAIN R. McPHIE, ESQ. 14 Squire Patton Boggs LLP 15 2500 M Street, N.W. 16 Washington, D.C. 20037 17 202-626-6688 18 On behalf of Commercial Television Claimants: 19 JOHN I. STEWART, Jr., ESQ. 20 DAVID ERVIN, ESQ. 21 ANN MACE, ESQ. 22 Crowell & Moring LLP 23 1001 Pennsylvania Avenue, N.W. 24 Washington, D.C. 20004 25 202-624-2685</p>	<p style="text-align: right;">4403</p> <p>1 APPEARANCES (Continued): 2 On behalf of Canadian Claimants Group: 3 L. KENDALL SATTERFIELD, ESQ. 4 Satterfield PLLC 5 1629 K Street, N.W., Suite 300 6 Washington, D.C. 20006 7 202-355-6432 8 9 VICTOR J. COSENTINO, ESQ. 10 Larson & Gaston, LLP 11 200 S. Los Robles Avenue, Suite 530 12 Pasadena, CA 91101 13 626-795-6001 14 15 On behalf of Settling Devotional Claimants: 16 ARNOLD P. LUTZKER, ESQ. 17 BENJAMIN STERNBERG, ESQ. 18 Lutzker & Lutzker LLP 19 1233 20th Street, N.W., Suite 703 20 Washington, D.C. 20036 21 202-408-7600 22 23 24 25</p>

<p style="text-align: right;">4404</p> <p>1 APPEARANCES (Continued): 2 On behalf of Settling Devotional Claimants: 3 MATTHEW J. MacLEAN, ESQ. 4 MICHAEL A. WARLEY, ESQ. 5 JESSICA T. NYMAN, ESQ. 6 Pillsbury Winthrop Shaw Pittman LLP 7 1200 Seventeenth Street, N.W. 8 Washington, D.C. 20036 9 202-663-8183</p> <p>10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">4406</p> <p>1 Baseball, Vicky Loughery from the National 2 Football League, and our co-counsel, 3 Mr. Hochberg. 4 JUDGE BARNETT: Let me say what I said 5 at the end of the hearing, in case I forget at 6 the end of the Closing Arguments. I want all 7 the clients who are here to know how well 8 represented you have been. You have fine 9 lawyers, all of you. Go ahead. 10 MR. GARRETT: Would you like to 11 elaborate, your Honor? 12 JUDGE BARNETT: They should be paid a 13 bonus. 14 JUDGE STRICKLER: The devil is in the 15 details. Maybe quit while you're ahead. 16 MR. GARRETT: You're absolutely right, 17 your Honor. 18 I said good morning. Let me start by 19 noting, as you well know there are five studies 20 that are in the record here each of which is 21 intended to show the relative marketplace value 22 of the Joint Sports Claimants category, as well 23 as other categories. The Bortz survey puts the 24 JSC share at 38.2 percent. And Ms. McLaughlin 25 for Public Television has adjusted that to</p>
<p style="text-align: right;">4405</p> <p>1 P R O C E E D I N G S 2 (9:41 a.m.) 3 JUDGE BARNETT: As you well know it is 4 the date and time for the Closing Arguments in 5 the allocation phase of Cable Distribution for 6 2010 and 2013. And we understand that -- or we 7 have adopted by order the agreement of the 8 parties -- we've adopted by order the agreement 9 of the parties regarding the order of 10 presentation Closing Arguments and the time 11 limits. And we're beginning with the Sports 12 Claimants. And Mr. Garrett, are you the 13 spokesperson? 14 MR. GARRETT: Yes, your Honor, I am. 15 JUDGE BARNETT: Are you reserving any 16 time for rebuttal? 17 MR. GARRETT: Yes, your Honor; 18 15 minutes of the one hour, please. 19 JUDGE BARNETT: Okay. Then let's 20 begin. 21 CLOSING ARGUMENT OF JOINT SPORTS CLAIMANTS 22 MR. GARRETT: Good morning, your 23 Honors. I'm Bob Garrett for the Joint Sports 24 Claimants. With me is a deep bench, Mike 25 Mellis and Mitch Schwartz from Major League</p>	<p style="text-align: right;">4407</p> <p>1 account for the PTV-only and Canadian-only and 2 her adjustment brings the Sports' share to 36.6 3 percent. 4 Dr. Israel, a Joint Sports Claimants 5 witness, did a regression and he put the Joint 6 Sports Claimants' share at 37.5 percent. 7 Dr. Crawford on behalf of the Commercial 8 Television Claimants has also done a regression 9 that puts the Joint Sports Claimants at 10 31.5 percent. 11 The Horowitz surveys are at 12 30 percent. Our view is that no weight should 13 be given to the Horowitz survey. But if you 14 do, you should correct for the flaws and as I 15 will point out later on, if you do correct for 16 the flaws it brings the Joint Sports Claimants 17 share very close to what it is in the Bortz 18 survey. 19 Obviously, the outlier here is the 20 Gray viewing study and that has us at 21 2.9 percent, that is 27 percentage points less 22 than what the Program Suppliers' other study 23 shows, is the Horowitz survey. 24 Let me make three points briefly about 25 the Gray study. One is that there was no</p>

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<p>1 empirical evidence in the record supporting 2 Dr. Gray's theory that relative viewing equals 3 relative value for any programming category. 4 Second is that the empirical evidence 5 that is in the record, the hard data that is in 6 the record, shows that is wrong, that relative 7 value does not equate with relative viewing. 8 And third, there is really no record 9 basis here for departing from past precedent in 10 the allocation phase proceedings, which 11 established that unadjusted viewing does not 12 provide a measure of relative marketplace 13 value. 14 JUDGE STRICKLER: I think you used the 15 word "precedent" a moment ago. Are you saying 16 that factual determinations -- this has come up 17 in a number of the proposed findings and 18 responses -- that factual findings that were 19 made by our predecessors should constitute 20 precedent, as opposed to just law constituting 21 precedent? 22 MR. GARRETT: I think the statute 23 says, your Honor, that the Judges shall act on 24 the basis of prior rulings, determinations of 25 the Judges as well as their predecessors. That</p>	<p>1 here with regard to any of the particular 2 methods by which relative market value can be 3 determined? Or are you saying that we are 4 supposed to put some weight in some fashion -- 5 that I am not quite sure of -- on the prior 6 determinations of fact as opposed to law? 7 MR. GARRETT: I don't think it is a 8 purely de novo review hearing. But I do think 9 you have to ground your decisions on the record 10 in this case. And if the record is different 11 than what it has been in other cases, then you 12 will act accordingly and I understand that. 13 But I ask that you also look at this 14 through the prism of what Congress intended 15 when they adopted the law that created the 16 Copyright Royalty Board, which is that they 17 were trying to get to a system where there was 18 going to be consistency. There was concern 19 about the consistency from various separate, 20 independent CARPs being appointed and they felt 21 that -- that's not their only objective, but it 22 was certainly a primary objective in creating 23 the Copyright Royalty Board. To have 24 consistency. 25 This system that we have with</p>
4409	4411
<p>1 has been a prior ruling. In fact, two prior 2 rulings, one by the Judges, one by the CARP and 3 the Librarian, that make it clear that 4 unadjusted raw viewing data does not constitute 5 relative marketplace value. 6 JUDGE STRICKLER: Are you saying that 7 we don't need to think about it anymore? We 8 should just simply apply that principle from 9 prior determinations? Or we still have to 10 analyze it and determine whether there is fact 11 and reasoning as it pertains to the viewing, or 12 as it pertains to any of the other 13 methodologies and decide them on their own 14 merits based on the evidence here? 15 MR. GARRETT: You are definitely 16 right, your Honor, that we have to look at the 17 record here. That is why I led with the points 18 that when we look at the record here we do not 19 see any hard data, any empirical evidence 20 showing that relative market value equals 21 relative viewing, and relative viewing equals 22 relative market value. And the evidence that 23 we do have shows to the contrary. 24 JUDGE STRICKLER: Are you saying it is 25 a de novo review of the evidence as it exists</p>	<p>1 compulsory licensing where every year you are 2 potentially thrown into another dispute here 3 will become unworkable if each time the same 4 set of issues and the same set of facts comes 5 before the decision maker, there is going to be 6 a different ruling. 7 JUDGE STRICKLER: But there was a time 8 when viewing was considered in the Phase I or 9 now allocation phase where viewing was 10 considered to be the appropriate measuring tool 11 or a favorite measuring tool, and that fell out 12 of favor. So there was a lack of consistency 13 before that got us to the point where more 14 recent determinations were reliant more so on 15 surveys. And you are saying now we should not 16 ratchet that because consistency is important, 17 but it was inconsistency that got you to the 18 point that you are at right now. 19 MR. GARRETT: I don't think there was 20 inconsistency, your Honor. And I think the 21 evolution of going from viewing to the surveys 22 is one that took place over a three-decade 23 period. In the very first proceeding where 24 viewing was adopted was a 1979 proceeding. I 25 remember like it was yesterday, unfortunately.</p>

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<p>1 (Laughter.)</p> <p>2 MR. GARRETT: And at that point in</p> <p>3 time in Copyright law, the Tribunal said that</p> <p>4 the viewing study is the single most important</p> <p>5 piece of evidence in the record. All the</p> <p>6 parties in this proceeding here, save for the</p> <p>7 Program Suppliers, spent the next two to</p> <p>8 three decades trying to show why that</p> <p>9 conclusion was wrong. They got away with it in</p> <p>10 the first proceeding, but over time people</p> <p>11 presented evidence, a lot of evidence, to show</p> <p>12 that there is no relationship -- no one-to-one</p> <p>13 relationship between viewing and value.</p> <p>14 And what I'm saying here is that when</p> <p>15 you look at the record of -- oh, and during</p> <p>16 that period it was not that one day Judges, or</p> <p>17 the Judges' predecessors said: The last</p> <p>18 proceeding, viewing was the single most</p> <p>19 important piece of evidence in the record;</p> <p>20 today it's not. There were several proceedings</p> <p>21 that were litigated. There was a lot of</p> <p>22 evidence that was produced in those</p> <p>23 proceedings, some of which is part of the</p> <p>24 record here, too. And gradually, what the</p> <p>25 Judges did -- I should say the Judges'</p>	<p>1 witnesses, who all disagree with that view.</p> <p>2 Even the Program Suppliers' own 1:47,</p> <p>3 Ms. Hamilton, acknowledges that there is no</p> <p>4 one-to-one relationship between viewing and</p> <p>5 value.</p> <p>6 Now, it is of course the Judges'</p> <p>7 prerogative here to weigh that testimony. And</p> <p>8 the fact that we've got ten people on one side</p> <p>9 and they have one economist on one side saying</p> <p>10 that viewing is a value, you weigh that. But</p> <p>11 again, I ask you that when you do weigh that,</p> <p>12 look at the fact that there is no hard data,</p> <p>13 there is no empirical evidence, showing that</p> <p>14 relative viewing equals relative value.</p> <p>15 If we could go to the next slide. The</p> <p>16 other important point to consider is that there</p> <p>17 is hard data. There is empirical evidence in</p> <p>18 this record here. It directly contradicts</p> <p>19 Dr. Gray's theory, at least for JSC's</p> <p>20 programming.</p> <p>21 So I want to go through some of it,</p> <p>22 and we will start here with the slide that I</p> <p>23 think you saw during the course of the hearing.</p> <p>24 This comes from Dr. Israel's study where he</p> <p>25 looks at the cable network marketplace. And as</p>
4413	4415
<p>1 predecessors did -- was to accord less and less</p> <p>2 weight to viewing, because of these conceptual</p> <p>3 difficulties that I recall.</p> <p>4 But also because a stronger record had</p> <p>5 been built up for the support of something like</p> <p>6 attached to some survey and the use of that</p> <p>7 methodology. We get it. Nielsen. Okay?</p> <p>8 Everybody has heard of Nielsen. Bortz. I</p> <p>9 suspect nobody, until they get into this</p> <p>10 proceeding, has heard of Bortz. But he lives</p> <p>11 in the industry where we are focused. Okay?</p> <p>12 There are real problems with Nielsen</p> <p>13 and a company like Bortz, who can stay in this</p> <p>14 business over three decades doing market</p> <p>15 research for some of the top names and top</p> <p>16 clients in the industry, have developed a</p> <p>17 reputation of producing quality solid market</p> <p>18 research.</p> <p>19 But what I want to emphasize again is</p> <p>20 that you have Dr. Gray's theory that relative</p> <p>21 viewing equals public and market value. But</p> <p>22 you have no hard evidence, no empirical data</p> <p>23 supporting that. You have a number of</p> <p>24 witnesses from several of the parties, some</p> <p>25 economists, some industry folks, some other</p>	<p>1 the slide shows, it's limited -- this</p> <p>2 particular one is limited to TBS, which is</p> <p>3 significant, because TBS was really the first</p> <p>4 superstation. It was the prominent major</p> <p>5 distant signal.</p> <p>6 And you will see that TBS went out in</p> <p>7 the marketplace and they bought JSC programming</p> <p>8 and that programming accounted for 1.95 percent</p> <p>9 of the total programming hours that TBS</p> <p>10 programmed that year, or volume, roughly</p> <p>11 2 percent of volume.</p> <p>12 JUDGE BARNETT: And that would be the</p> <p>13 sports telecasts that fit within the</p> <p>14 definition --</p> <p>15 MR. GARRETT: Yes, your Honor.</p> <p>16 Baseball and basketball. It was 2 percent.</p> <p>17 Dr. Israel calculated the share of viewing</p> <p>18 hours, following much the same, approach that</p> <p>19 Dr. Gray did. And he totaled them up and then</p> <p>20 you see that JSC programming accounted for just</p> <p>21 under 6 percent, or 5.52 percent. But yet, as</p> <p>22 Dr. Israel found, TBS spent over 44 percent of</p> <p>23 its programming budget on just that JSC</p> <p>24 programming and the other 56 percent went to</p> <p>25 programming that constituted about 98 percent</p>

4416	4418
<p>1 that they used to fill out their lineup there.</p> <p>2 So assume you had a compulsory license</p> <p>3 that would allow TBS to acquire all of the</p> <p>4 programming it acquired during this period,</p> <p>5 2010-2013, and your job was to allocate royalty</p> <p>6 payments that they made between JSC and non-JSC</p> <p>7 programming. But Dr. Gray would tell you that</p> <p>8 that 1.95 percent is an imperfect measure of</p> <p>9 relative marketplace value.</p> <p>10 Well, it is a very imperfect measure,</p> <p>11 because the relative market value is</p> <p>12 44 percent, or over 40 percentage points</p> <p>13 higher. But Dr. Gray would also tell you that</p> <p>14 the real relative marketplace value of that TBS</p> <p>15 programming is 5.52 percent. That's what its</p> <p>16 viewing share is. But that would be wrong. We</p> <p>17 know that from hard data, empirical data that</p> <p>18 Dr. Israel developed.</p> <p>19 Let me just emphasize that no one has</p> <p>20 controverted those data here. No one has said</p> <p>21 you got these numbers wrong. That is not what</p> <p>22 happened. This information that was put in as</p> <p>23 part of our direct case, part of Dr. Israel's</p> <p>24 testimony.</p> <p>25 JUDGE STRICKLER: Isn't it</p>	<p>1 adopted the 3.75 rate. They relied on, at</p> <p>2 least in part, analogies to the cable network</p> <p>3 marketplace.</p> <p>4 If you go more recently in time when a</p> <p>5 CARP established the satellite carrier rate,</p> <p>6 the 119, the only rate adjustment we have had</p> <p>7 under the Section 119 license, in that case</p> <p>8 they too relied upon cable networks. And they</p> <p>9 adopted a rate that essentially was the same</p> <p>10 license fee that was being paid by the top 12</p> <p>11 cable networks. Ms. McLaughlin, who testified</p> <p>12 before you here, was the one who presented that</p> <p>13 particular analysis.</p> <p>14 So there certainly is -- I won't use</p> <p>15 the word precedence, but between Mr. Haminov's</p> <p>16 testimony and what has been done in the past to</p> <p>17 show that we can get some good information by</p> <p>18 looking at the cable network marketplace.</p> <p>19 And we can also say when you look at</p> <p>20 the cable network marketplace, that as I</p> <p>21 understand it is sort of the basis for this</p> <p>22 hypothetical marketplace that we are talking</p> <p>23 about here. That's what everybody says.</p> <p>24 You're not going to have Copyright Owners</p> <p>25 dealing directly with cable systems. You're</p>
4417	4419
<p>1 controverted not with regard to the data, but</p> <p>2 with regard to the analogy that his argument is</p> <p>3 that TBS during this time period,</p> <p>4 retransmission of distant programming is not</p> <p>5 analogous to the market in question that we are</p> <p>6 grappling with?</p> <p>7 MR. GARRETT: Yes, the only person who</p> <p>8 addressed this is Dr. Gray in his rebuttal and</p> <p>9 he dismisses it by saying: It is irrelevant.</p> <p>10 It doesn't really show us.</p> <p>11 A couple of things about that. First</p> <p>12 of all, Program Suppliers themselves in the</p> <p>13 last proceeding put on a Mr. Haminov -- whose</p> <p>14 testimony is also in the record of this</p> <p>15 proceeding here -- who focused on the top 25</p> <p>16 cable networks. He didn't do this analysis,</p> <p>17 but he did other analyses showing how relevant</p> <p>18 the cable network marketplace is as to the</p> <p>19 kinds of issues that were before the Judges at</p> <p>20 that time. All right? So you have Haminov's</p> <p>21 testimony.</p> <p>22 In addition, if you go back -- and</p> <p>23 this is many years, but unfortunately I</p> <p>24 remember this one too. This is the 3.75</p> <p>25 proceeding where the Copyright Royalty Tribunal</p>	<p>1 going to have a Copyright Owner who is going to</p> <p>2 deal with, in our hypothetical marketplace,</p> <p>3 broadcasters. But here they deal with TBS,</p> <p>4 which packages together the programming. And</p> <p>5 then they go out and license it to their cable</p> <p>6 system clients. Okay?</p> <p>7 This analogy, too, is even more</p> <p>8 significant because we have this debate: In</p> <p>9 this hypothetical marketplace, are we to have</p> <p>10 advertising inserted or not? Well, our view is</p> <p>11 not. Okay? And that, I think, comes through</p> <p>12 with the testimony of Ms. McLaughlin, Public</p> <p>13 Television. We think that you should be</p> <p>14 distributing these royalties here assuming the</p> <p>15 same set of conditions, the same kinds of</p> <p>16 restrictions, the same terms that are in the</p> <p>17 compulsory license.</p> <p>18 But as you can see with TBS, which</p> <p>19 doesn't insert advertising and does allow its</p> <p>20 cable system clients to insert advertising,</p> <p>21 this is the kind of ratio you are getting.</p> <p>22 The other I think I would say in</p> <p>23 answer to your question about is this the wrong</p> <p>24 marketplace, I think that point that Dr. Gray</p> <p>25 offers sort of misses the point. What this</p>

4420	4422
<p>1 analysis is showing here is that an hour is not 2 an hour, whether it is a viewing hour or it's a 3 time hour. That's his theory. Okay? You can 4 get some useful information just by looking at 5 tonnage. I'd say the information you get is 6 not terribly useful. You can equate value with 7 viewing. That's his theory. This shows 8 exactly the opposite, at least for JSC 9 programming. There is no one-to-one 10 relationship.</p> <p>11 And I won't dwell on it. I have other 12 slides I can put up. She did one for TNT that 13 is in his testimony and you see similar kinds 14 of ratios. We have one where he went out and 15 did the top 25 cable networks, pretty much kind 16 of the Haminov kind of focus on cable networks. 17 And again, you see that viewing does not equal 18 value.</p> <p>19 And I don't want to jump too far 20 ahead, although we have already talked about 21 the past rulings here. But it is evidence like 22 that that has been introduced over many, many 23 years of these proceedings that finally led the 24 CARP in 1998 to say: You're right. Viewing 25 doesn't equal value. If the Program Suppliers</p>	<p>1 between what cable systems pay in the way of 2 license fees for these various cable networks 3 and how that relates to the viewing shares. 4 Now, I want to digress for a second. 5 We all use the term viewing here as though it 6 has some commonly accepted meaning, and it 7 doesn't. Viewing means a lot of different 8 things in the industry. And if you look 9 closely at the testimony here, when many 10 witnesses are referring to viewing, they are 11 not referring to it in the same sense that 12 Dr. Gray calculates viewing. They are talking 13 about audience size. How many people are 14 actually watching? Who has got the programming 15 that attracts the most viewers?</p> <p>16 Dr. Gray's analysis is a little bit 17 different. He comes in and says: Well, we're 18 going to measure the number of minutes that 19 people watch programming. So if 100 people 20 watch a half-hour show, that's worth half as 21 much as a one hour show that attracts exactly 22 the same audience. That is his measure of 23 viewing. What you have in this chart here is 24 looking at ratings. Ratings is nothing but the 25 number of households that are watching,</p>
4421	4423
<p>1 want to present viewing studies, present one 2 that adjusts the viewing but adjusts the 3 viewing so that it does equal value. And they 4 tried that. They came in in the 1998 5 proceeding, they offered this Court an avidity 6 adjustment from Dr. Gruen and the CARP said: 7 That doesn't get the job done. That doesn't 8 really take us from viewing to value. So they 9 gave no weight to it.</p> <p>10 And that is exactly what your 11 predecessors, the Judges, did in the '04-'05 12 proceeding when they came in with the other try 13 at adjusting, this time by Dr. Ford; he used 14 some advertising-based metrics and the Judges 15 concluded: That dog don't hunt either. And 16 what they ultimately did was accord no weight.</p> <p>17 I have some other things I want to 18 mention, go to the next slide. This was a 19 Stata graph that was not part of our case -- it 20 was actually part of the Commercial Television 21 Claimants' case -- and what it shows, 22 Dr. Crawford -- for this proceeding, but also 23 in his academic research where he worked with a 24 number of colleagues from some very prestigious 25 universities to look at the relationship</p>	<p>1 compared to some base, all cable households in 2 the United States, all television households, 3 something like that. But basically what this 4 Stata graph shows is that there is no 5 relationship, particularly for the Joint Sports 6 Claimants' programming. The network could have 7 the Joint Sports Claimants programming all in 8 the red.</p> <p>9 And if we could go to the next slide, 10 this is what Dr. Grimm says -- whoops, this is 11 what Dr. Crawford says: The difference in the 12 amount of money paid by cable systems to 13 networks providing sports versus non-sports 14 content for the same level of viewership is 15 remarkable. Not only are fees for sports 16 content much higher than fees for non-sports 17 content for the same level of viewership, they 18 are typically a multiplicative -- 19 multiplicative --</p> <p>20 JUDGE BARNETT: Multiplicative? 21 MR. GARRETT: I can't talk like an 22 economist. And then he goes on and the second 23 quote is from the academic research that he has 24 done. 25 JUDGE BARNETT: But, Mr. Garrett, what</p>

<p style="text-align: right;">4424</p> <p>1 they pay for programming doesn't really have 2 any influence whatsoever over what they pay in 3 royalties, because those are measured by 4 distant signal equivalents; right? 5 MR. GARRETT: Yes, your Honor, that is 6 correct. But -- 7 JUDGE BARNETT: So draw the analogy to 8 that. 9 MR. GARRETT: I think we all agreed 10 that royalties here should be allocated the way 11 they would be in a free marketplace. That's 12 what we're trying to get at. What is the 13 relative marketplace value of the different 14 categories of programming. 15 And what you see from the evidence 16 that I presented, there is a functioning 17 marketplace. There we have buyers and sellers 18 getting together. They are buying JSC 19 programming and buying other kinds of 20 programming and this is what you see, the kinds 21 of ratios. And what you see is that it is not 22 something that is determined -- or that value 23 -- or that viewing that equates to relative 24 value. That's what's going on in the real 25 marketplace where you don't have proceedings</p>	<p style="text-align: right;">4426</p> <p>1 the Bortz survey for sports is borne out when 2 you look at what is going on in the 3 marketplace. 4 Yes, we have a small amount of 5 programming, because or programming tends to be 6 on in prime time and afternoon hours. We don't 7 -- the Program Suppliers, you can pick up those 8 little viewing minutes all day long. You can 9 run your infomercial at 3:00 a.m. in the 10 morning and some NPM household that has nothing 11 better to do might put down one more minute 12 that falls into their bucket. 13 But ours comes in select patterns, but 14 it is recognized in the industry as extremely 15 valuable programming. And so what you see in 16 these I want to call them benchmarking or 17 analogous marketplaces, is something that both 18 relates to Dr. Gray's theory, and two, shows 19 that the results of the Bortz study -- not only 20 the results of the Bortz study, but both the 21 regressions, the Israel regression and the 22 Crawford regression, they show the same thing. 23 JUDGE BARNETT: And does this funnel 24 through to that very tiny percentage of 25 programming that is distantly referred to here</p>
<p style="text-align: right;">4425</p> <p>1 like this. That's the relationship I'm trying 2 to draw. 3 And again to get back to the point, 4 your Honor, that when it comes to Dr. Gray's 5 theory that viewing equals value, it's 6 unsubstantiated. And the evidence that you do 7 have in the record, as there has been in many 8 records in the past, is that there is no such 9 one-to-one relationship. 10 JUDGE STRICKLER: So when you look at 11 the TBS and the TNT analyses that were done, we 12 are really looking at those markets, if I 13 understand you correctly, in the benchmarking 14 context. They're not the market that we are 15 looking at here, but you are saying they are 16 benchmarks in the sense that they are 17 sufficiently analogous -- even though there is 18 advertising revenue that goes into those 19 markets -- but they are sufficiently analogous 20 that we can gain information that we should 21 apply with regard to this regulated market? 22 MR. GARRETT: Yes, your Honor. And 23 the two critical pieces of information are 24 that, one, viewing does not equal value. And 25 that, two, the kind of ratios that you see in</p>	<p style="text-align: right;">4427</p> <p>1 in the same proportion. 2 MR. GARRETT: Yes, and what we're 3 saying, your Honor, is that if you look at in 4 the marketplace there, it's a very tiny 5 percentage of JSC programming that is on TBS or 6 on TNT, certainly in the top 25 of cable. 7 Ms. Hamilton came in and said she had 8 a budget for sports of somewhere between 35 and 9 40 percent. Well, think about that. Cable 10 systems carry hundreds of channels. Hundreds 11 of channels. How much of that is actually 12 sports? It's going to be something in the 13 1 percent or 2 percent kind of range here. And 14 so we are saying yes. 15 And incidentally, if we can flip over 16 to slide 10, this is another piece of data that 17 is in Dr. Israel's study where he looks at the 18 amount of the JSC programming in the distant 19 signal marketplace. This is not -- these 20 numbers are not controverted either. He 21 compares it -- it was actually Dr. Crawford who 22 came up with the numbers for the 2010-2013 23 period and he compares with what Ducey came up 24 with for '04-'05. And as you can see, our 25 share is growing a little bit. We don't make</p>

<p style="text-align: right;">4428</p> <p>1 much of that fact that is that much bigger. It 2 is 4.5 to 5.9. But that 5.9 percent is bigger 3 than what we see on TBS or what we see on TNT 4 or what we see in the top 25 cable networks. 5 Our point is that we simply have a 6 larger share of this distant signal 7 marketplace, the one that you have to be 8 concerned with, we have a bigger share of that 9 than we do of the cable network marketplace. 10 And you see what the kinds of ratios that there 11 are there. 12 I jumped ahead before to talking about 13 the past decisions. I don't want to say much 14 more about the allocation decisions. I don't 15 want to in any way suggest that you are bound 16 to do exactly what your predecessors did 17 because they did it. That is not our position. 18 We tried to put together a record that 19 shows why it is wrong to equate viewing and 20 value; why it makes sense that you get results 21 that you do in the Bortz study, in the Israel 22 regression, and the Crawford regression. 23 We're also not unaware of what you've 24 done in your distribution phase proceedings, 25 the Phase II proceedings with respect to</p>	<p style="text-align: right;">4430</p> <p>1 you are bound by what you did in those Phase II 2 proceedings with respect to viewing, because 3 there are different considerations. Not only 4 different considerations, but there is a 5 different record. We have a different record 6 here with the Bortz study, with the 7 regressions, with data like we have here from 8 Dr. Crawford. 9 I also want to very briefly make the 10 point that this is not the case to depart from 11 precedent. And if we could can just pull up 12 slide 7. I won't go into all of this in 13 detail; we have spent a lot of time on it in 14 the course of the hearings. But it's important 15 to understand, I think, that this is a very 16 inappropriate case to now switch the allocation 17 -- from the rulings that have been made in the 18 past. 19 Number one is: The data is wrong. 20 Everybody acknowledges that it is wrong, we've 21 put in. You cannot rely upon those numbers. 22 Dr. Gray's only defense on that is that he 23 thinks we are in a, quote, "zone of 24 reasonableness." And how does he justify that? 25 He says: Well, the data is wrong because we</p>
<p style="text-align: right;">4429</p> <p>1 viewing. And we are not suggesting that you 2 need to change that approach simply because we 3 don't think you can use it here in the 4 allocation phase proceeding. 5 The fact of the matter is that when 6 you first adopted viewing or looked favorably 7 upon viewing in the 2000 to 2002 Phase II 8 proceeding, you did it primarily by focusing on 9 other Phase II decisions. And there was a 10 theory there that Dr. Gray espoused that, well, 11 viewing is okay as long as you have got 12 homogenous programming. He says in this 13 proceeding that his thinking has evolved since 14 then and now he thinks it applies more broadly. 15 But whatever that is, the decision was made in 16 the context of Phase II. 17 And when IPG challenged your using 18 viewing as a result of -- in the Phase II, the 19 response was: Phase II is different than Phase 20 I. And that's exactly what the Court of 21 Appeals said. There are -- quoting the 22 Librarian's decision in an earlier decision: 23 There are different considerations in Phase II 24 than in Phase I. 25 To put it another way, I don't think</p>	<p style="text-align: right;">4431</p> <p>1 don't have WGNA, which is the most widely 2 carried distant signal reaching over 40 million 3 subscribers. We don't have that there, but it 4 is important for the distant signal marketplace 5 and not as great as it once was but there is 6 less compensable programming. Well, there is 7 less compensable programming on WGNA, but it is 8 the Program Suppliers' programming that is 9 less, not ours. 10 When you go to the next slide you see 11 in 2010 -- this is a table that is taken from 12 Mr. Harvey's report. And you can see that 13 there is a fair amount of JSC programming on 14 WGNA. And it generates a pretty large 15 audience. That number 143,770, what that is 16 telling you is the number of households who 17 watched JSC programs on WGNA during that 18 2010-'13 period was twice as big as the number 19 of households that watched the Program 20 Suppliers' programming. So we are a very 21 important part of WGNA and its compensable 22 programming. 23 If we go to the Bortz report, which is 24 Exhibit 1001, page 28, you will see more data 25 there that really shows how the amount of</p>

<p style="text-align: right;">4432</p> <p>1 Program Suppliers' compensable programming has 2 gone way down on WGNA. But as the next slide 3 will show, our numbers of telecast on WGNA has 4 remained relatively constant, maybe gone up a 5 little bit.</p> <p>6 So what does that mean? Well, if you 7 don't put WGNA into your viewing analysis, 8 we're the ones who get hurt. It doesn't hurt 9 Program Suppliers very much. And maybe 10 Dr. Gray's justification, he said: Well, the 11 number of compensable programming is way down. 12 Yeah, but it is compensable Program Suppliers' 13 program that is way down. So not putting WGNA 14 is going to depress our share; it's going to 15 inflate their share. And the bottom line is 16 you have the wrong numbers. Everybody 17 acknowledges that. What the record doesn't 18 show is exactly how wrong they are.</p> <p>19 Go back two slides. I think other 20 points that we have made throughout here, and 21 again, I'm not going to try to belabor them. 22 But it is wrong to use the NPM database to come 23 up with these estimates. It is a national 24 database for nationally distributed 25 programming.</p>	<p style="text-align: right;">4434</p> <p>1 misused. It is not being used for the purpose 2 for which it was intended. That is why you get 3 a lot of zeros.</p> <p>4 And even putting aside the zeros, you 5 realize that 99 percent of the data that he has 6 is data that reflects either zero or only one 7 household viewing. Just a single household.</p> <p>8 There are other problems. Failure to 9 weight, for example. The fact that he says he 10 he's got local viewing data. It's not local 11 viewing data according to Nielsen. NPM does 12 not measure local markets. The data that he 13 does have on the local side is also missing, 14 over 50 percent of the records.</p> <p>15 I want to briefly just turn to the 16 Horowitz, unless there are other questions 17 about Nielsen. I have been talking about it 18 for 40 years.</p> <p>19 JUDGE BARNETT: It feels like we have 20 been listening to it for 40 years.</p> <p>21 (Laughter.)</p> <p>22 MR. GARRETT: I feel your pain, your 23 Honor.</p> <p>24 Let's go to slide 11. Again, I won't 25 get into all the details. I think you</p>
<p style="text-align: right;">4433</p> <p>1 And I know that the analogies here 2 about left-handed New Yorkers and too many 3 green jelly beans and all of that, and that all 4 makes perfect sense when you are trying to 5 justify the NPM sample, when you are trying to 6 project nationwide viewing from nationally 7 delivered programming, yeah, you are going to 8 get some anomalies here and there. But that 9 does not justify what has been done in this 10 case. A sample has not been selected in order 11 to try to get appropriate viewing measures for 12 regionally distributed programming. NPM is 13 nationally distributed programming.</p> <p>14 And we see that when we look at the 15 number of records that Dr. Gray got from 16 Lindstrom that have zero viewing data, or at 17 most only one household viewing. I know that 18 zero viewing data has been an issue in the 19 Phase II proceedings for reasons I think are 20 different from what we have right here, and you 21 resolved that you understood Dr. Gray's 22 explanation that that's bad. But what the 23 zeros tell us, and what our experts have told 24 you, is the reason you are getting those zeros 25 is because you have got a sample that is being</p>	<p style="text-align: right;">4435</p> <p>1 understand our position on Horowitz, that no 2 weight should be given to that. There are a 3 number of reasons here. The misleading program 4 examples, the improper creation of another 5 sports category, the fact that they do value 6 noncompensable WGNA programming and not making 7 any meaningful efforts to deal with that issue.</p> <p>8 In fact, they said, this is the 9 similar to the list that I put it in the 10 opening, it's just that it got a little longer 11 as we went through the hearings here. But 12 another key fact is that they asked their 13 respondents to value programming for which no 14 royalty was being paid, exempt signals, which 15 were in most cases Public Television signals. 16 But not all; Commercial, as well.</p> <p>17 Other issues. The biggest issue, and 18 the one that has been a part of these 19 proceedings for several years, is other sports. 20 And here is the difference between the Bortz 21 survey and the Horowitz survey. With the Bortz 22 survey, the argument has always been you asked 23 them to value live professional and college 24 team sports, and they're really thinking about 25 NASCAR. And so they are going to give a value</p>

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<p>1 for NASCAR. Or they are thinking about 2 wrestling or something like that.</p> <p>3 There is no -- and never has been any 4 evidence that that is in fact what was going 5 on. And the responsive part, look, with the 6 Bortz survey we are trying to get their 7 dominant impression about the signature 8 programming. Trying to get the values. That 9 is how it is done in the marketplace. And it's 10 very unlikely that those kinds of programs, or 11 a tennis match or golf, are the ones that are 12 driving the values, in part because there is 13 not much of that in the distant signal 14 marketplace. Yes, there is golf. Yes, there 15 is tennis, all on TV. There is NASCAR. Some 16 of it is on distant signal; a lot of it is on 17 cable networks or it is on other networks. But 18 the point with respect to Bortz is that that's 19 what's driving the results here.</p> <p>20 Horowitz, the difference is that they 21 come in and they affirmatively suggest to the 22 respondents that: Oh, this is the other sports 23 programming that you're carrying. And forget 24 about -- you can forget about all the 25 respondents now, except those that carry WGNA</p>	<p>1 can go to the next slide here, our view is that 2 you should not accord any weight to Horowitz: 3 But we do note that the number that you get for 4 sports in Horowitz is within striking distance 5 of the ones that you get from all the other 6 studies.</p> <p>7 What Mr. Trautman did, he went through 8 and he just replaced all of the 45 percent of 9 the respondents who carried the WGNA as its 10 only distant signal, replaced that with the 11 results that you get from his survey, which we 12 think is much better. He wasn't giving them 13 examples, he gave them an actual program 14 summary and told them: This is what programing 15 is in each category. And nobody is thinking 16 about NASCAR.</p> <p>17 And when you meld the two studies 18 together with the different groups of 19 respondents, you will see that we are still a 20 little short in Horowitz from what we have in 21 Bortz, but it is a lot closer.</p> <p>22 I think I have two minutes. Let me 23 just -- in two minutes go to slide 13.</p> <p>24 With Bortz in the last two 25 proceedings, the Judges and their predecessors</p>
4437	4439
<p>1 -- over 45 percent of their respondents carried 2 WGNA only as their only commercial distant 3 signal.</p> <p>4 And as we have pointed out and our 5 witnesses have pointed out in this proceeding, 6 that 45 percent of respondents, they carry a 7 maximum of two hours a year of other sports 8 programming. That did not warrant a separate 9 category in that survey.</p> <p>10 In 2010, aside from the small amount 11 of it which we had the Horowitz survey doing 12 this saying: All right, here is a horse race. 13 It's an example of the kinds of other sports 14 programming that is on WGNA. It wasn't an 15 example. It was the only programming. It was 16 a one-hour telecast, in two of the years a 17 30-minute telecast. That is the only sports 18 that they get.</p> <p>19 It is also important to recognize that 20 in these examples -- these are not examples 21 that Horowitz research came up and said: Yeah, 22 they are typical, they are representative. 23 These are examples that were simply fed to them 24 by MPAA and they accepted them unquestionably. 25 One thing just to keep in mind, if we</p>	<p>1 started with the Bortz results and then 2 adjusted them to account for other kinds of 3 evidence in the record. And that is the 4 approach that we urge your Honors to follow in 5 this case, as well, here.</p> <p>6 I think the important thing to 7 remember is that we believe that Bortz is going 8 to the right person to get an answer, the cable 9 system operator. They are asking the right 10 question. This is a methodology they have used 11 for a number of years. They have tried to 12 improve it in response to issues raised in 13 these proceedings, to comments made from 14 Judges, and continue to do that.</p> <p>15 It finds corroboration not only in the 16 regressions of Israel and Crawford, but in the 17 analogous cable marketplace data that I began 18 my conversation with you about.</p> <p>19 Your Honors, you indicated an interest 20 in having individuals with industry experience 21 come and testify, at least in one of your Phase 22 II decisions, and we have done that. We have 23 tried to do it from two perspectives, someone 24 who is in the cable system -- a programming 25 executive for a major MSO, and someone who was</p>

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<p>1 at a satellite operation, DirecTV, competing</p> <p>2 with cable operators to talk about what they</p> <p>3 value in the marketplace and why the Bortz</p> <p>4 results make sense.</p> <p>5 So let me end with: Our bottom line</p> <p>6 is that in the last two proceedings, the</p> <p>7 decision makers started with a Bortz and</p> <p>8 adjusted them, and we ask that you do the same</p> <p>9 thing here. I think if you do, we are going to</p> <p>10 come up with a number that is pretty close to</p> <p>11 the one that we had in the Bortz results.</p> <p>12 Thank you, your Honors. I will</p> <p>13 save -- I guess I have 15 minutes left.</p> <p>14 JUDGE BARNETT: Mr. Stewart, you're</p> <p>15 the spokesperson for Commercial Television.</p> <p>16 Would you like to reserve any time for</p> <p>17 rebuttable?</p> <p>18 MR. STEWART: I'd like to reserve</p> <p>19 15 minutes.</p> <p>20 JUDGE BARNETT: Okay.</p> <p>21 CLOSING ARGUMENT COMMERCIAL TELEVISION CLAIMANTS</p> <p>22 MR. STEWART: Good morning. I am here</p> <p>23 on behalf of the Commercial Television</p> <p>24 Claimants. We want to thank you first for your</p> <p>25 attention throughout these proceedings. We</p>	<p>1 Now, I said in our Opening Statement</p> <p>2 that notwithstanding the number of witnesses</p> <p>3 you would be hearing from today, the case from</p> <p>4 our perspective is going to boil down to your</p> <p>5 evaluation of these three principal</p> <p>6 quantitative evidence -- pieces of evidence</p> <p>7 that are comprehensive in terms of covering all</p> <p>8 the categories, and they are the Bortz survey,</p> <p>9 the regression analyses, and the Program</p> <p>10 Suppliers' so-called viewing study.</p> <p>11 We believe the record has been fully</p> <p>12 developed and that you have the basis in the</p> <p>13 record for evaluating those two studies. The</p> <p>14 first two studies provide you the evidence that</p> <p>15 you need to determine and adopt fully supported</p> <p>16 allocations decisions in this case.</p> <p>17 We think, as Mr. Garrett suggested,</p> <p>18 that your allocation should ultimately be</p> <p>19 determined following the same approach that was</p> <p>20 followed by the Judges in '04-'05 proceeding,</p> <p>21 which is the most recent allocation phase</p> <p>22 proceeding.</p> <p>23 So the starting point identified by</p> <p>24 the Judges there was the augmented Bortz</p> <p>25 survey. We think that will be your starting</p>
4441	4443
<p>1 hope that the evidence we have provided you you</p> <p>2 have found both interesting and now helpful as</p> <p>3 you turn to the job you have of deciding our</p> <p>4 allocations.</p> <p>5 This morning I'd like first to provide</p> <p>6 a brief overview of how we see the evidence in</p> <p>7 this case and the path forward to the</p> <p>8 allocations.</p> <p>9 Next, I'd like to discuss two</p> <p>10 principal quantitative studies that we'll be</p> <p>11 urging you to rely on in this case in making</p> <p>12 your allocation decisions: The Bortz survey</p> <p>13 and the Crawford regression analysis.</p> <p>14 Next, I want to discuss the evidence</p> <p>15 that has been put in by the Program Suppliers,</p> <p>16 which we will urge you to give no weight in</p> <p>17 your decisions. They are the viewing-related</p> <p>18 study that Dr. Gray has put in and the Horowitz</p> <p>19 survey.</p> <p>20 I'll briefly discuss the approaches</p> <p>21 taken by the other parties in the proceeding,</p> <p>22 Canadians, Public Television, and Devotionals.</p> <p>23 And finally, I'd like to walk you</p> <p>24 through the steps of what we would propose as</p> <p>25 your allocation determinations.</p>	<p>1 point here, and I will get back to that. And</p> <p>2 they used the results of a regression study</p> <p>3 that was also presented by CTV in that</p> <p>4 proceeding for the basis for making adjustments</p> <p>5 to the augmented Bortz numbers for the</p> <p>6 Devotional share, and I will get back to those</p> <p>7 in detail.</p> <p>8 Now, for this proceeding we have</p> <p>9 worked hard to provide you with valid and</p> <p>10 reliable evidence on which you can base your</p> <p>11 decisions. We think that there is both good</p> <p>12 economic theory underlaying those studies and</p> <p>13 valid methodologies that have been presented.</p> <p>14 Based on what we've looked at and what</p> <p>15 we've tried to do in this year's proceeding, we</p> <p>16 think that -- and based on comments made by the</p> <p>17 Judges on our two prior regression analyses --</p> <p>18 we believe we've presented what is a</p> <p>19 substantially improved econometric study. The</p> <p>20 Bortz survey was also improved in several ways</p> <p>21 and those have been put in the record by the</p> <p>22 Sports Claimants.</p> <p>23 But from our perspective this is</p> <p>24 exactly how you would want the process to work</p> <p>25 and the way it has worked for many years. The</p>

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1 parties here take seriously the criticisms and
2 concerns that are identified by the Judges and
3 then they look at those studies and they
4 attempt to make improvements to them so that
5 the next time you have to -- you are called on
6 to decide these same allocation issues, you
7 have what we have attempted to provide as
8 improved evidence.

9 And I think that in this case we have
10 both stronger and more reliable and substantial
11 evidence to support your decisions.

12 Now let me turn to the principal
13 quantitative studies, the Bortz study and the
14 Crawford regression. In the '04-'05 decision,
15 the CRJs found the Bortz survey the most
16 persuasive piece of evidence. In the same
17 decision, the CRJs found that our Waldfogel
18 regression analysis, presented by Professor
19 Waldfogel, corroborated the Bortz survey, but
20 also provided additional useful independent
21 information about CSO values.

22 And for each study, as I mentioned,
23 the CRJs identified concerns that they had and
24 issues that had been raised by the parties and
25 they evaluated those issues. In this

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1 proceeding both JSC and CTV have gone to some
2 lengths to address those concerns and the
3 result is that both of these principal pieces
4 of evidence on which the Judges based their
5 decision in '04-'05 have become stronger and
6 more reliable for 2010 to '13.

7 With respect to the regression
8 analysis, we have made a number of
9 improvements. First, we studied all of the
10 distant signal programming over all four years,
11 rather than using a sample.

12 Second, as a result of STELA, the CSOs
13 began making their distant signal decisions and
14 calculating their royalties based on subscriber
15 subgroups, smaller communities within their
16 broader systems. And that phenomenon produced
17 a variation across subscriber groups, which was
18 usable in the regression analysis in a way that
19 was different from the prior system-based
20 regressions.

21 The substantial increase in the actual
22 distant signal marketplace data -- because
23 remember, CSOs are not bound to carry or select
24 particular distant signals; they are free to
25 decide which distant signals are valuable to

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1 them in which communities within their cable
2 system -- but the substantial increase in the
3 data that was available because of this shift
4 to subgroups allowed, as well, for the use of a
5 fixed-effects approach in the regression. And
6 a fixed-effects approach addresses issues of
7 unknown variables which had been among the
8 criticisms levied by the other parties against
9 prior regressions.

10 The ultimate effect of these
11 differences and improvements was an elimination
12 of the year-by-year or year-to-year volatility
13 that parties complained about in the '04-'05
14 regression of Dr. Waldfogel and radical
15 improvement in the precision of the estimates.
16 Unlike the Waldfogel regression results, all of
17 Dr. Crawford's results for the key program
18 variables are positive and statistically
19 significant for 2010 to 2013.

20 Now, in the '04-'05 decision, the CRJs
21 also found the regression results useful
22 because they independently corroborated the
23 Bortz survey results. These regressions asked
24 the same question as Bortz, but they asked it
25 of the data rather than the cable operators

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1 themselves. The regression analysis was
2 straightforward and transparent, based on the
3 premise of economic choice measuring all the
4 distant signal programming actually purchased
5 by the cable operators during the period
6 against the royalties that they actually paid.

7 In this case, the Crawford regression
8 was prepared entirely independently of the
9 Bortz survey or the Israel regression, and yet
10 the results are remarkably similar, and similar
11 not because they are identical -- which would
12 be suspicious, if you ask me -- but instead are
13 with respect to the rank order of the relative
14 values or the relative shares of the top four
15 categories out of six, they're the same. With
16 respect to the rough magnitude of those shares,
17 they're the same.

18 And interestingly with respect to the
19 PTV and Canadian shares, the Bortz shares are
20 lower than for the regression shares, but
21 that's in part because of the sort of this
22 fundamental design feature of the Bortz survey.
23 Because they determined that it would be
24 inappropriate to ask systems that carried only
25 PTV signals or only Canadian signals to provide

<p style="text-align: right;">4448</p> <p>1 a relative allocation in a constant sum survey. 2 So they were omitted and they're not omitted 3 from the regression, and so you see that 4 difference and it makes perfect sense. 5 The Devotional share in the regression 6 is lower than in the Bortz survey and that is 7 the same thing we saw in the '04-'05 case. 8 But given that these studies were 9 performed entirely independently, using 10 entirely different data and entirely different 11 methodologies focused on the same question, 12 attacking the same question from different 13 perspectives, it is truly remarkable that they 14 are as similar -- as comparable as they are. 15 And I think that that -- and this is a 16 question, not a comment by Judge Strickler 17 during the proceeding -- they are mutually 18 corroborative. It does seem that asking the 19 question through the data and asking the 20 question through the market participants 21 arrives at results that are mutually 22 corroborative. 23 So based on the record as a whole in 24 this case, consistent with prior precedent, the 25 Bortz survey and the Crawford regression are</p>	<p style="text-align: right;">4450</p> <p>1 to enhance the cable operator's own business 2 interests community by community. 3 Secondly, you know, Dr. Crawford said 4 in his testimony that he replicated Crawford's 5 regression without the minimum fee systems and 6 came up with wildly different results. That is 7 simply false. As he admitted, he changed the 8 analysis. And I find in Program Suppliers' 9 proposed findings that he said he had to change 10 the analysis entirely to a system-based rather 11 than subgroup-based regression because cable 12 operators pay minimum fees at the system level. 13 But that's nonsense. 14 All you have to do, and what 15 Dr. Crawford did after seeing his rebuttal, is 16 take the data out. Take the subgroup out for 17 the systems that paid a minimum fee. When 18 Dr. Crawford did that, he arrived at 19 essentially the same results as his initial 20 regression. 21 So there is evidence that, first, 22 minimum fee systems do make economic choices 23 about the distant signals they carry. And 24 second, at the econometric level, that that 25 difference makes no difference to the ultimate</p>
<p style="text-align: right;">4449</p> <p>1 both probative evidence of relative marketplace 2 value. 3 JUDGE STRICKLER: I'm sorry; one of 4 the criticisms that was levied at all of the 5 regressions that you are citing that come to 6 relatively consistent results -- and I think it 7 was a criticism made by Dr. Gray and made by 8 Dr. Erdem as well -- is that there is no 9 accounting for the fact that there is a minimum 10 fee that needs to be paid, regardless of 11 whether or not the distant signal is being 12 retransmitted. How do you respond to that 13 criticism? 14 MR. STEWART: Two ways. One, if you 15 look at the example that's given to illustrate 16 that fact in Dr. Gray's own rebuttable 17 testimony, you see a system that has more than 18 20 subgroups, but that pay the minimum fee. 19 But among those 20 subgroups you see from zero 20 distant signals to 17 distant signals in 21 different communities. 22 That's a cable operator who is making 23 determinations based on economic interests 24 about attracting and retaining subscribers, and 25 what is important and valuable to subscribers</p>	<p style="text-align: right;">4451</p> <p>1 results. 2 And by the way, Dr. Crawford's 3 regression focuses on the subgroup level and 4 essentially takes all of the distant signal 5 programming across all the distant signals for 6 that particular group of subscribers and then 7 takes the royalties that are actually 8 calculated by the system for that subgroup and 9 compares those two things. All the programs 10 and all of the royalties subgroup by subgroup. 11 And it's not a fee-generated system at all, 12 which is a criticism that others have made. 13 But in doing so, he does reflect the 14 work that cable operator has actually 15 calculated in terms of what the royalties would 16 be for the subgroup. If the cable operator 17 begins to provide -- acquires additional 18 subgroups, that's a trend that is actually 19 happening, lots more consolidation, then there 20 may be -- then they may go over the minimum 21 fee, but they still would be calculating their 22 fees and deciding on their distant signals on a 23 community-by-community or subgroup-by-subgroup 24 basis. 25 So let me turn to the Program</p>

<p style="text-align: right;">4452</p> <p>1 Suppliers, because it's a very different story 2 for this set of comprehensive, quantitative 3 evidence in the Program Suppliers case. They 4 needed their so-called viewing study where 5 their cable operator survey should be given any 6 weight in making determinations. And I say 7 so-called viewing, because I want to echo the 8 point that Mr. Garrett made. We have this way 9 of -- the Program Suppliers have this way of 10 providing misleading shorthand. They say 11 Nielsen is synonymous with ratings. They say 12 viewing is the currency of the realm, and so 13 on. But the viewing they're talking about -- 14 and I can tell you this based on my client's 15 industry -- has nothing to do with what 16 Dr. Gray has done.</p> <p>17 So for them to wrap themselves in the 18 mantle of the viewing that is so important in 19 the broadcast industry, and without explaining 20 the differences, say that suggests that their 21 viewing study should also be used as a measure 22 of relative marketplace value is just wrong, 23 and we need to be careful about that.</p> <p>24 Program Suppliers' approach in this 25 case is just the latest in a long history of</p> <p style="text-align: right;">4453</p> <p>1 unsuccessful attempts to try to turn relative 2 amounts of viewing into relative marketplace 3 value. We strongly believe, and have presented 4 evidence in this case, and in prior cases for 5 many years, that a viewing study asks the wrong 6 question and is simply not relevant to the 7 question of marketplace value.</p> <p>8 Now, it would be helpful for you to 9 adjoin the line of cases that have determined 10 that it is not relevant in the allocation 11 phase. And certainly then you would then -- 12 and we -- would not have to talk about it 13 anymore, and I'd like that.</p> <p>14 But we think in this case you may not 15 actually need to do that. And that's because 16 in this case the Program Suppliers' evidence is 17 so defective that you can reject it on that 18 basis alone. That the studies themselves are 19 simply not usable in this context.</p> <p>20 So first, the biggest problem: 21 Omitting the WGNA data. Now from our 22 perspective, that alone all by itself renders 23 the Gray viewing study completely unreliable 24 and invalid.</p> <p>25 In my opinion it would have been</p>	<p style="text-align: right;">4454</p> <p>1 appropriate for Program Suppliers to have 2 withdrawn that study by now. To my surprise, 3 Program Suppliers has actually presented 4 proposed findings of fact -- just as the first 5 one, Proposed Finding of Fact Number 9 -- in 6 which they say that viewing estimates is 7 reliable as to all non-WGNA stations and all of 8 the other Gray data in Dr. Gray's analysis as 9 reported in Gray Table 2 is reliable. And 10 Table 2 is the relative viewing shares. Well, 11 that is simply wrong.</p> <p>12 You know, it's important to note how 13 careful they are in their language. Because 14 they talk about viewing estimates included in 15 Nielsen's custom analysis provided to Dr. Gray. 16 That's the stuff -- that's the raw data that 17 Mr. Lindstrom provided to Dr. Gray. But when 18 they then move on to the Table 2, those viewing 19 shares that Dr. Gray called "expected viewing 20 shares," are not reliable and do not have 21 anything to do with that Nielsen custom study.</p> <p>22 Now, Program Suppliers in its filing 23 on Friday pushed the envelope even farther. In 24 their Proposed Response 62, they say that 25 Dr. Gray testified about a zone of</p>
<p style="text-align: right;">4453</p> <p>1 unsuccessful attempts to try to turn relative 2 amounts of viewing into relative marketplace 3 value. We strongly believe, and have presented 4 evidence in this case, and in prior cases for 5 many years, that a viewing study asks the wrong 6 question and is simply not relevant to the 7 question of marketplace value.</p> <p>8 Now, it would be helpful for you to 9 adjoin the line of cases that have determined 10 that it is not relevant in the allocation 11 phase. And certainly then you would then -- 12 and we -- would not have to talk about it 13 anymore, and I'd like that.</p> <p>14 But we think in this case you may not 15 actually need to do that. And that's because 16 in this case the Program Suppliers' evidence is 17 so defective that you can reject it on that 18 basis alone. That the studies themselves are 19 simply not usable in this context.</p> <p>20 So first, the biggest problem: 21 Omitting the WGNA data. Now from our 22 perspective, that alone all by itself renders 23 the Gray viewing study completely unreliable 24 and invalid.</p> <p>25 In my opinion it would have been</p>	<p style="text-align: right;">4455</p> <p>1 reasonableness and caused WGNA's viewing 2 contributions to be expected to be a relatively 3 small fraction of total viewing.</p> <p>4 Now, they know, we know, we all know, 5 what actually happens when you bring that WGNA 6 viewing in. But your Honors struck that from 7 this proceeding. The contents of the so-called 8 Third Errata are not fair game in this 9 proceeding.</p> <p>10 So we should not have proposed 11 responses or proposed findings that suggest 12 that if you fixed it, it wouldn't have any 13 significant impact. Because that's the same as 14 describing the content of the Third Errata 15 misleadingly.</p> <p>16 In any event, Dr. Gray's own testimony 17 actually confirms the opposite. The 18 uncorrected results are not usable at all. And 19 at transcript page 3945 in response to my 20 cross-examination questions about WJZ -- 21 remember, we had the chart that showed that 22 Dr. Gray's expected viewing was actually a 23 number of households who tuned to programs on 24 WJZ as a distant signal was actually less than 25 those Nielsen reported actually tuned to WJZ</p>

<p style="text-align: right;">4456</p> <p>1 programming.</p> <p>2 And I didn't understand it at first</p> <p>3 and he kept after me and insisted that the</p> <p>4 reason for that mistake is because WGNA had</p> <p>5 been excluded. And, in fact, then in response</p> <p>6 to cross-examination from Mr. Cantor in this</p> <p>7 transcript, 4054 to 4055, Dr. Gray agrees</p> <p>8 completely that the estimates for all of the</p> <p>9 stations are ineffective and inaccurate because</p> <p>10 of the omission of the WGNA data.</p> <p>11 That right there is a basis for your</p> <p>12 giving no weight whatsoever to the relative</p> <p>13 viewing that MPAA is trying to propose as a</p> <p>14 measure of relative value, even apart from the</p> <p>15 questions that Mr. Garrett spent time on and</p> <p>16 which I have spent time on, as well, since the</p> <p>17 1979 proceeding. And we would like to not do</p> <p>18 that again, but if you prefer you can strike</p> <p>19 the study on the basis of those errors in the</p> <p>20 study.</p> <p>21 And there are other problems, a number</p> <p>22 of which are equally independently -- present</p> <p>23 independent basis for rejecting the study</p> <p>24 entirely. Even if he included all of the</p> <p>25 relevant data, the Gray data doesn't meet the</p>	<p style="text-align: right;">4458</p> <p>1 Program Suppliers in 2010; somewhat smaller</p> <p>2 increases in 2011 and '12; and produces a loss</p> <p>3 in every single year for the Commercial</p> <p>4 Television Claimants' share produces a loss in</p> <p>5 every single year for the Public Television</p> <p>6 Claimants' share. So this is not a comparable</p> <p>7 substitute for the Nielsen data that is</p> <p>8 actually reported.</p> <p>9 And I want to say, as well, that when</p> <p>10 Program Suppliers argue about the precedent</p> <p>11 that says that viewing is the most important</p> <p>12 piece of evidence in the record and that it is</p> <p>13 an appropriate measure, this, Dr. Gray's study,</p> <p>14 again, has nothing to do with what they</p> <p>15 presented in all of those prior years. Because</p> <p>16 in those prior years they had Nielsen data that</p> <p>17 measured the actual viewing that was possible</p> <p>18 to be measured in all of the Nielsen markets</p> <p>19 and that's what they presented. This isn't</p> <p>20 even that. And the differences you can see</p> <p>21 favor Program Suppliers.</p> <p>22 Now, this general approach moreover is</p> <p>23 more that Ms. Shagrin in her decades of work in</p> <p>24 the audience measurement industry had never</p> <p>25 heard of anyone using. That is replacing all</p>
<p style="text-align: right;">4457</p> <p>1 standard that was noted by the Judges in the</p> <p>2 '04-'05 case that any study that is presented</p> <p>3 to you and purports to provide useful</p> <p>4 information has been to be reasonably</p> <p>5 well-founded methodologically.</p> <p>6 Dr. Gray's study is not well-founded</p> <p>7 methodologically. It doesn't use the actual</p> <p>8 Nielsen data themselves. And, in fact,</p> <p>9 Dr. Bennett presented this chart, which is his</p> <p>10 Figure 22, in which he showed what the</p> <p>11 percentage -- what the difference is if you</p> <p>12 used Nielsen's actual viewing data to describe</p> <p>13 the percentages of viewing of the parties,</p> <p>14 versus what Dr. Gray projected in his</p> <p>15 regression-based expected viewing, in which he</p> <p>16 replaced all of the actual reports of viewing</p> <p>17 with his own predictions. And you see that not</p> <p>18 only are they different, but this again is just</p> <p>19 the difference in the percentage in the share</p> <p>20 points of each of the parties.</p> <p>21 And you see that Program Suppliers in</p> <p>22 following the methodology of Dr. Gray, of not</p> <p>23 reporting the Nielsen viewing data that was</p> <p>24 actually measured but instead using Dr. Gray's,</p> <p>25 produces an increase of 11.98 points for</p>	<p style="text-align: right;">4459</p> <p>1 of the actual Nielsen data with a projection</p> <p>2 different from the actual Nielsen data.</p> <p>3 Dr. Gray himself had no evidence that</p> <p>4 anyone else had ever done such a thing. And</p> <p>5 the results that show the bias in favor of</p> <p>6 Program Suppliers may be a sufficient answer to</p> <p>7 the question of why they did that.</p> <p>8 But Dr. Gray also talked about his</p> <p>9 rather arbitrary objective of predicting</p> <p>10 viewing for every single quarter hour of every</p> <p>11 single program on every single distant signal</p> <p>12 on every day of every year. Now, I must say</p> <p>13 that I personally argued about zero viewing in</p> <p>14 Phase II cases in the 1980s when we represented</p> <p>15 broadcasters whose programs were syndicated and</p> <p>16 we were in Phase II with Program Suppliers.</p> <p>17 And the reason was Program Suppliers reported</p> <p>18 viewing based on a nonrandom sample of stations</p> <p>19 and they simply didn't have any of our programs</p> <p>20 on the sample stations.</p> <p>21 And so we argued that you can't do</p> <p>22 that. You can't have a Phase II case in which</p> <p>23 the allocation -- the distribution has to be</p> <p>24 among specific programs, you can't have a Phase</p> <p>25 II case based on the viewing study that doesn't</p>

<p style="text-align: right;">4460</p> <p>1 actually cover enough of the programs. So 2 that's what we were complaining about. 3 So you might even consider that to be 4 an issue in today's proceedings, but it's not 5 an issue and should not be the objective in 6 this case. It's nonsensical. 7 Oh, my. Okay. So we -- I'm just 8 going to say that Dr. Gray's methodology in 9 which he made up local viewing numbers -- he 10 called it imputed -- for stations was in 11 50 percent of the data for local and 90 percent 12 of the data overall, is fallacious. And so I 13 was going to show you -- those -- the blue 14 marks on this map are the only ones in which 15 there is Local People Meter viewing. All the 16 rest are ones in which there is no local 17 viewing at all. 18 And let's skip forward. You can take 19 that down and I'll skip over that part. 20 Just in terms of the other parties, I 21 want to talk about the Canadians. The 22 Devotional and Public Television Claimants 23 don't provide their own studies; they rely on 24 others. But they also each pick a different 25 one and say you should not pay any attention to</p>	<p style="text-align: right;">4462</p> <p>1 Suppliers on WGNA and therefore made 2 adjustments. And they didn't make them in the 3 way that we are proposing that they do. This 4 is the evidence in the record from Exhibit 1002 5 that shows the increase in noncompensable 6 programs on WGNA for those two categories. 7 Next slide. This shows the comparison 8 from -- and this is from Exhibit 2004, 9 Dr. Crawford's study, the comparison between 10 the total minutes and the compensable minutes. 11 And you will see that when you look at these 12 Figures 11 and 12 in Exhibit 2004, you will see 13 that the difference between the total minutes 14 and compensable minutes for Devotional 15 Claimants and Program Suppliers is very 16 substantial. 17 Go to the next slide. This is what we 18 would suggest to use as the other side of the 19 balance, the augmented Bortz survey. That is 20 Dr. Crawford's nonduplicate minutes analysis 21 shares. 22 And the next slide. So what we would 23 propose -- and this is not what the '04-'05 24 Judges did -- is that you use in the evidence 25 in the Crawford study, which is more precise</p>
<p style="text-align: right;">4461</p> <p>1 this one at all. Let's look at slide Number 2 17. 3 The Judges have said in the past that 4 if you're going to say -- if you are going to 5 persuade the Judges that you should not 6 consider at all a study that has been relied on 7 in prior proceedings, this is the standard that 8 you have to meet. And I would simply say that 9 it is so terribly flawed that it cannot be 10 considered. The prior decision makers got it 11 completely wrong. And neither the Public 12 Television Claimants nor the Devotional 13 Claimants have reached -- have met that 14 standard. 15 Finally, I'd like to walk you quickly 16 through -- this is presented in our response 17 findings. But if we could go to slide Number 18 19. These are the augmented Bortz survey 19 shares as presented by -- as calculated by 20 Ms. McLaughlin and this was from Exhibit 1101. 21 Go to the next slide. These are -- 22 and the next one, the '04-'05 Judges made -- 23 recognized that there was a problem with the 24 compensable -- the growth of noncompensable 25 programming for both Devotionals and Program</p>	<p style="text-align: right;">4463</p> <p>1 than the Waldfogel study was, as the other side 2 of the coin essentially in determining how to 3 make the adjustments. 4 So what we have done here is simply 5 show the midpoint between the augmented Bortz 6 share and the Crawford regression share and 7 suggest that would be an appropriate adjusted 8 share for these each of these two studies. 9 And so then the rest is going to be 10 math. You basically replace them and allocate 11 the difference pro rata between CTV and JSC. 12 And then the next slide. Then you 13 have to make a further mathematical adjustment 14 to reflect the fact that CTV does not 15 participate in the 3.75. This is in our 16 response findings. But unless there are other 17 questions, I will sit down. 18 JUDGE BARNETT: Thank you, 19 Mr. Stewart. 20 Let's take a 15-minute recess before 21 we move on to Public Television. 22 (A recess was taken at 10:58 a.m., 23 after which the trial resumed at 11:20 a.m.) 24 JUDGE BARNETT: Mr. Dove, you are 25 provided for 30 minutes. Do you want to</p>

<p style="text-align: right;">4464</p> <p>1 reserve time for rebuttal?</p> <p>2 MR. DOVE: Yes, ten minutes for</p> <p>3 rebuttal, please.</p> <p>4 JUDGE BARNETT: Okay.</p> <p>5 CLOSING ARGUMENT OF PUBLIC TELEVISION CLAIMANTS</p> <p>6 MR. DOVE: Good morning, your Honors.</p> <p>7 Ron Dove on behalf of the Public Television</p> <p>8 Claimants.</p> <p>9 Your Honor, every party in this</p> <p>10 proceeding, and every valuation expert, has</p> <p>11 agreed that the relative value of Public</p> <p>12 Television's programs has increased from</p> <p>13 2004-'05 to 2010-'13. There is no dispute</p> <p>14 about that. And so the only question from our</p> <p>15 perspective is how high Public Television's</p> <p>16 share should be set. So that is what I want to</p> <p>17 talk about this morning.</p> <p>18 Now that all the record evidence is in</p> <p>19 and all the witnesses have testified, we</p> <p>20 believe that Dr. Crawford's regression analysis</p> <p>21 best answers that question because it provides</p> <p>22 the most accurate shares for all of the</p> <p>23 parties.</p> <p>24 The CARP in the 1998-'99 proceeding</p> <p>25 predicted that this day would come. They said</p>	<p style="text-align: right;">4466</p> <p>1 quote, "best suited" for determining relative</p> <p>2 marketplace value in these proceedings.</p> <p>3 Four of the six parties in this</p> <p>4 proceeding support using Dr. Crawford's</p> <p>5 analysis as a measure of relative value in some</p> <p>6 capacity. And for example, the Commercial</p> <p>7 Television Claimants state that Dr. Crawford's</p> <p>8 regression, quote, "provides a valid and</p> <p>9 reliable basis for determining allocation</p> <p>10 awards." They state that in their Conclusions</p> <p>11 of Law.</p> <p>12 And Dr. Crawford, your Honors, is the</p> <p>13 only truly global study. We have seen other</p> <p>14 slides about global studies, but his study is</p> <p>15 really the only truly global study in this</p> <p>16 proceeding. All the other studies leave</p> <p>17 something out, whether it be PTV-only systems,</p> <p>18 WGNA programming, an entire year of data, or</p> <p>19 otherwise require multiple adjustments. So,</p> <p>20 again, Dr. Crawford's study is the only truly</p> <p>21 global one.</p> <p>22 It's important to remember, I think,</p> <p>23 your Honors, that the purpose of these</p> <p>24 proceedings is to determine the relative value</p> <p>25 of compensable programming actually</p>
<p style="text-align: right;">4465</p> <p>1 that if the volatility and variability of the</p> <p>2 Rosston regression analysis are improved,</p> <p>3 similar analyses may prove useful for directly</p> <p>4 measuring relative value in future years. For</p> <p>5 directly measuring relative value.</p> <p>6 The Judges then in 2004-'05 agreed.</p> <p>7 While they noted there were limits to the</p> <p>8 Waldfoegel regression at issue in that</p> <p>9 proceeding, they stated that those limits</p> <p>10 largely stemmed from the wide confidence</p> <p>11 intervals of the coefficients, not from the</p> <p>12 method itself. The Judges found that</p> <p>13 conceptually, a properly conducted regression</p> <p>14 analysis may provide a richer look than the</p> <p>15 Bortz survey into factors that impact the</p> <p>16 purchases decision of cable operators.</p> <p>17 So we submit, your Honors, that the</p> <p>18 future that these panels predicted has now</p> <p>19 arrived.</p> <p>20 Dr. Crawford's regression analysis</p> <p>21 greatly improves on what was done in the past</p> <p>22 and is far superior to any of the other</p> <p>23 proposed measures in this case. Indeed,</p> <p>24 Dr. Crawford himself testified that his</p> <p>25 approach is the, quote, "Best method" and,</p>	<p style="text-align: right;">4467</p> <p>1 retransmitted on distant signals. So any</p> <p>2 methodology how it values or potentially values</p> <p>3 programming outside of these contours shouldn't</p> <p>4 be used if there is a better methodology that</p> <p>5 avoids those pitfalls.</p> <p>6 Your Honors have previously held that</p> <p>7 actual examples of marketplace behavior are far</p> <p>8 superior to mere testimony regarding</p> <p>9 perceptions of industry participants. And</p> <p>10 numerous experts in these proceedings agree</p> <p>11 with that perspective, Dr. Crawford,</p> <p>12 Dr. George, Dr. Steckel, Dr. Shum, and</p> <p>13 Mr. Horowitz, just to name a few.</p> <p>14 Dr. Crawford's regression analysis</p> <p>15 best captures actual observable marketplace</p> <p>16 behavior. And there are two reasons why it is</p> <p>17 the best method for awarding shares here, and</p> <p>18 Mr. Stewart has touched on these, so I will</p> <p>19 briefly summarize.</p> <p>20 First, Dr. Crawford has got the best</p> <p>21 data. Dr. Crawford -- well, actually</p> <p>22 Dr. Bennett put together the most comprehensive</p> <p>23 dataset that has ever been presented in these</p> <p>24 proceedings. It had all of the programming</p> <p>25 data on all of the distant signals for the</p>

<p style="text-align: right;">4468</p> <p>1 entire four-year period. Nothing else in this 2 proceeding or in any prior proceeding even 3 comes close.</p> <p>4 Second, Dr. Crawford used the best 5 methodology. He used subscriber group data as 6 Mr. Stewart talked about to capture more 7 variation than every before. He had highly 8 effective control measures that even controlled 9 for unobserved factors.</p> <p>10 And I think even most importantly 11 here, Dr. Crawford's analysis is very precise 12 with much narrower confidence intervals than 13 any other regression analysis ever presented in 14 these proceedings.</p> <p>15 So in other words, Dr. Crawford solved 16 the variability problem that prior panels were 17 concerned about. He solved that. So is 18 Dr. Crawford's study perfect? No, it is not. 19 I mean, as we have all learned sitting in these 20 proceedings, replicating the hypothetical 21 marketplace by its nature involves uncertainty. 22 But it is Public Television's view that based 23 on the evidence in this record, the Crawford 24 analysis is far superior to everything else. 25 As Dr. Frankel testified in response</p>	<p style="text-align: right;">4470</p> <p>1 methodology that gives it less than its highest 2 possible share. The Bortz surveys give Joint 3 Sports, Commercial Television, and the 4 Devotionals their highest average shares and 5 that is what they propose. Dr. George gives 6 the Canadian Claimants their highest share and 7 that is what they propose. And Dr. Gray's 8 viewing study gives Program Suppliers their 9 highest share and that's what they've proposed. 10 Only Public Television takes the more 11 conservative route in this instance.</p> <p>12 Public Television is also the only 13 party that has proposed a share for each party 14 that does not require adjustment. The other 15 parties leave it to you, the Judges, to figure 16 out how to rescue the data and somehow correct 17 for the various biases that have been 18 identified.</p> <p>19 The -- what I would call ad hoc 20 adjustments, somewhat arbitrary adjustments 21 that Commercial Television proposes to correct 22 the Bortz survey results illustrates this 23 problem. As we saw Mr. Stewart walking through 24 those and laid out in pages 26 to 29 of their 25 response paper, it's just rescuing and</p>
<p style="text-align: right;">4469</p> <p>1 to a question from Judge Strickler, data that 2 doesn't need to be edited or rescued is better 3 than data that needs to be edited or rescued.</p> <p>4 And so with that in mind, here are the 5 average shares that we propose for all the 6 parties based on Dr. Crawford's initial 7 analysis.</p> <p>8 In paragraph 44 and 45 of our Proposed 9 Findings, we report these shares for each year 10 and we adjust them to the basic in 3.75 funds, 11 but this is a summary of shares on the slide.</p> <p>12 Now, a few interesting points about 13 these shares. First, under Dr. Crawford's 14 analysis, every party receives a share that is 15 lower than their highest share across all the 16 methodologies presented in this proceeding. So 17 for example Public Television's share of 18 18.8 percent is significantly lower than the 19 33 percent share it would receive if the Judges 20 were to adopt Dr. Gray's viewing methodology.</p> <p>21 Joint Sports still has the most highly 22 valued programs under Dr. Crawford's analysis, 23 just slightly lower than his Bortz share. One 24 other thing to note is that Public Television 25 is the only party, the only party proposing a</p>	<p style="text-align: right;">4471</p> <p>1 correcting for data is just too complex and too 2 arbitrary.</p> <p>3 We do agree with the Commercial 4 Television Claimants and the Joint Sports 5 Claimants that the Crawford analysis measures 6 relative marketplace value. We also agree with 7 them that the Bortz survey is biased against 8 Public Television and that Public Television's 9 shares should be higher in 2010 to '13 than it 10 was in 2004-'05.</p> <p>11 Where we part ways with those two 12 claimant groups, however, is on the fundamental 13 question of whether the Bortz survey is 14 salvageable. In other words, can it be 15 corrected to address its numerous problems? 16 They say it can be; we say it cannot be, 17 particularly as to Public Television.</p> <p>18 The record clearly shows, your Honors, 19 that while regression analyses have become more 20 robust and more reliable as the years have gone 21 by, the Bortz survey is going in the opposite 22 direction. It has more flaws than ever before 23 and has never been this biased or unreliable.</p> <p>24 And we have prepared a slide that 25 highlights all the various problems with the</p>

<p style="text-align: right;">4472</p> <p>1 Bortz survey. And we don't have time to 2 discuss all of these and they are laid out in 3 great detail in our Proposed Findings and the 4 Proposed Findings of some of the other parties. 5 But to summarize, first, Bortz is 6 systematically biased against Public Television 7 and is more biased against Public Television 8 than ever before. 9 Bortz discarded more Public 10 Television-only systems in 2010 to '13 than in 11 any previous time period. More than 50, more 12 than 50 in total. 13 There was also nonresponse bias this 14 time against Public Television, including a 15 failure to survey any Verizon system that 16 carried Public Television. This was despite 17 the fact that Verizon paid the second most 18 royalties of any MSO and carried many more 19 distant Public Television stations. 20 Another problem was the amount of 21 compensable programming on WGNA. You know, it 22 fell by half, yet Bortz still didn't identify 23 any noncompensable programming to any survey 24 respondent that carried Public Television. 25 Remember, if your system carried only</p>	<p style="text-align: right;">4474</p> <p>1 comprehensive dataset. 2 In the second column the Bortz 3 methodology was also more unreliable and 4 invalid than any before as a methodology. And 5 most importantly, it was far more complex this 6 time around because systems got much larger and 7 subscriber groups were used to carry certain 8 distant signals to certain parts, but not to 9 other parts of the system. 10 Everyone agrees that the programming 11 decisions were increasingly made at a more 12 centralized level, either regionally or even 13 nationally. Which means that for the 2010 to 14 '13 Bortz survey, the respondents were 15 responsible for many more cable systems than 16 they were in the past. 17 Bortz also changed the warmup 18 questions to talk about experience and cost and 19 changed the wording of the constant sum 20 question, but didn't pre-test any of those 21 changes. So no one knows what the Bortz 22 respondents were thinking when they answered 23 those questions or if they misunderstood the 24 question. 25 Too many changes. So it's just more</p>
<p style="text-align: right;">4473</p> <p>1 WGNA, the Bortz viewer interviewer gave you a 2 list of program samples and hours of 3 programming. But if you also carried Public 4 Television or some other signal, you got no 5 such list of compensable programming on WGNA. 6 That was only in a special circumstance of 7 WGNA-only systems. 8 Bortz' Public Television share is also 9 contradicted by all -- all of the other 10 measures in this proceeding, as we can see from 11 this next slide. Ms. McLaughlin tried to 12 correct for one of those biases, the discarded 13 systems, and came up with an augmented Bortz 14 share of 8 percent. But that share didn't 15 address any of the other biases there. 16 Mr. Horowitz corrected for two -- the 17 first two biases, but still his share of 18 13.2 percent was too low, because it didn't 19 correct for any of the other biases. 20 Dr. Israel has a separate problem. He 21 is missing 2013 data all together, which was 22 Public Television's best year. 23 Only Dr. Crawford fixes each of these 24 biases against Public Television because he 25 uses all of the data available. He has a</p>	<p style="text-align: right;">4475</p> <p>1 unreliable and invalid than before. 2 And finally in this proceeding we saw 3 that many of the Bortz responses were 4 demonstrably invalid and unreliable. So we 5 talked about the methodology now, but the 6 responses themselves -- and we laid this out in 7 great detail in our Proposed Findings, pages 59 8 to 77 -- but just to summarize, we saw that the 9 valuation of movies by respondents that only 10 carried WGNA did not match up with the dramatic 11 changes in the amount of compensable movies on 12 that signal from year to year. 13 We also saw, when you actually look at 14 the Bortz responses, that those same 15 respondents valued each hour of live sports 16 programming the same as an hour of Devotional 17 programming at 5:00 a.m. in the morning. That 18 makes no sense, particularly given all the NBA 19 and Major League Baseball programming on WGNA. 20 And remember, your Honors, that those 21 respondents that carried only WGNA had an 22 easier task. It's still a very complicated 23 task, but they had an easier task and were 24 given more information than any of the other 25 Bortz respondents, including those that carried</p>

<p style="text-align: right;">4476</p> <p>1 Public Television.</p> <p>2 Finally, your Honors, this next slide</p> <p>3 shows the Bortz shares for most of the claimant</p> <p>4 categories are contradicted by both</p> <p>5 Dr. Crawford and Dr. Israel's regressions.</p> <p>6 Only sports has Bortz shares that on average</p> <p>7 are within the Crawford confidence interval and</p> <p>8 only Sports and Commercial Television have</p> <p>9 shares from Dr. Israel that fall within the</p> <p>10 range of Bortz estimates.</p> <p>11 So given I have a minute or two left,</p> <p>12 I just want to say a few words, your Honors,</p> <p>13 about viewing which has come up with morning.</p> <p>14 One might wonder what is Public Television's</p> <p>15 position about viewing. It is a 33 percent</p> <p>16 share, why wouldn't you be advocating that?</p> <p>17 Our position with regard to the</p> <p>18 viewing study is that there are data problems</p> <p>19 with the viewing study and we acknowledge</p> <p>20 those. But it is important to note that there</p> <p>21 are also major data problems with the Bortz</p> <p>22 study and the Horowitz surveys, as well. And</p> <p>23 they all involve the same thing, WGNA; just</p> <p>24 from a different side of the coin, if you will.</p> <p>25 We all know 85 percent of WGNA</p>	<p style="text-align: right;">4478</p> <p>1 be the basis for your Honors' awards.</p> <p>2 And so, unless there are any</p> <p>3 questions, your Honors, I will reserve the</p> <p>4 remaining time for rebuttal and we will go with</p> <p>5 that.</p> <p>6 JUDGE BARNETT: Thank you, Mr. Dove.</p> <p>7 MR. DOVE: Thank you.</p> <p>8 JUDGE BARNETT: Who is presenting for</p> <p>9 Canadian Claimants?</p> <p>10 MR. SATTERFIELD: I am.</p> <p>11 JUDGE BARNETT: Mr. Satterfield, it's</p> <p>12 your turn. Would you like to reserve any time</p> <p>13 for rebuttal?</p> <p>14 MR. SATTERFIELD: Yes.</p> <p>15 CLOSING ARGUMENT OF CANADIAN CLAIMANTS GROUP</p> <p>16 MR. SATTERFIELD: Thank you, your</p> <p>17 Honors, Kendall Satterfield for the Canadian</p> <p>18 Claimants. I hate to disappoint; we don't have</p> <p>19 a PowerPoint presentation.</p> <p>20 As you've heard from many parties, we</p> <p>21 were associated in the past with the fee</p> <p>22 generation approach. We essentially took the</p> <p>23 theory that because there are three different</p> <p>24 types of signals, U.S. Commercial Television,</p> <p>25 Public Television stations and Canadian</p>
<p style="text-align: right;">4477</p> <p>1 programming is noncompensable. Well, the Bortz</p> <p>2 and the Horowitz surveys, how do they deal with</p> <p>3 that? They don't really deal with that</p> <p>4 adequately. So there are many respondents who</p> <p>5 could be valuing noncompensable WGNA</p> <p>6 programming.</p> <p>7 Gray on the other hand, Dr. Gray, that</p> <p>8 WGNA programming is excluded from his dataset</p> <p>9 and we could see that that is a problem. But</p> <p>10 we still think that viewing -- it's relevant to</p> <p>11 these proceedings. It's just not clear that</p> <p>12 Dr. Gray's study -- actually that viewing</p> <p>13 equates to value as has been discussed.</p> <p>14 But that said, programming can't have</p> <p>15 value if it's not being viewed. So we do think</p> <p>16 it's appropriate to use viewing for</p> <p>17 corroboration -- as sort of a reality check, if</p> <p>18 you will, or a zone of reasonableness -- and</p> <p>19 maybe for adjustments to the extent other</p> <p>20 studies may not be capturing the whole project.</p> <p>21 But, again, all of that aside, our</p> <p>22 position is that you don't need to do any of</p> <p>23 that. That the Crawford regression analysis</p> <p>24 captures all of that in a way never before seen</p> <p>25 in these proceedings and we propose that that</p>	<p style="text-align: right;">4479</p> <p>1 stations, it would be possible to divide the</p> <p>2 royalties into three pots.</p> <p>3 And we spent a lot of time with this</p> <p>4 fight. We got the '98 to '99 CARP to more or</p> <p>5 less adopt that type of approach. But as you</p> <p>6 are aware, the Copyright Judges in 2003</p> <p>7 adopted, because of the unusual structure of</p> <p>8 that case, but in '04-'05 they chose to treat</p> <p>9 that as a ceiling for and used Bortz as a</p> <p>10 floor.</p> <p>11 So for this proceeding we were faced</p> <p>12 with having to come up with a new approach.</p> <p>13 And having evaluated what Dr. Waldfogel did in</p> <p>14 '04-'05, we chose to take on that as our</p> <p>15 primary method for determining the value of the</p> <p>16 Canadian award.</p> <p>17 So using that approach, and with the</p> <p>18 resources that we have available -- and we are</p> <p>19 one of the smallest groups here and we don't</p> <p>20 have unlimited resources -- we chose to develop</p> <p>21 a regression that was more focused on the</p> <p>22 unique circumstances of the Canadian Claimants,</p> <p>23 and that is that our signals by law can only be</p> <p>24 retransmitted in a narrow geographic strip of</p> <p>25 the country.</p>

4480	4482
<p>1 The thinking that Dr. George developed</p> <p>2 was that that area is unique from a marketplace</p> <p>3 standpoint because there is this other type of</p> <p>4 programming, these other types of signals that</p> <p>5 are competing in that zone that do not exist</p> <p>6 anywhere else in the country. That is a unique</p> <p>7 situation. So a unique market. Obviously, in</p> <p>8 other local markets there are a multitude of</p> <p>9 local markets in the country and there are</p> <p>10 always signals available in those markets. But</p> <p>11 with the exception of the superstations they</p> <p>12 are all unique and just focus on the signals</p> <p>13 around them. So Dr. George developed a</p> <p>14 regression that tried to factor this in.</p> <p>15 So under her regression, the Canadian</p> <p>16 Claimants get a higher result than under</p> <p>17 Dr. Crawford's. Now Dr. George was extremely</p> <p>18 positive towards Dr. Crawford's efforts in</p> <p>19 these proceedings, as Mr. Dove just laid out.</p> <p>20 The study that Dr. Crawford put together was</p> <p>21 comprehensive. It required a tremendous amount</p> <p>22 of effort, cost a lot of money -- we are</p> <p>23 envious of his abilities -- and produced</p> <p>24 results that applied to all the parties</p> <p>25 nationwide.</p>	<p>1 Commercial TV station. And then there are the</p> <p>2 unique French stations, and French stations are</p> <p>3 primarily carried in a very small geographic</p> <p>4 region of the United States where there has</p> <p>5 been this historically French ancestry. And</p> <p>6 there are still obviously people speaking</p> <p>7 French or the cable systems wouldn't continue</p> <p>8 to carry those stations in those areas. So</p> <p>9 those are sort of our unique circumstances.</p> <p>10 So it is our view that Dr. Crawford is</p> <p>11 fantastic, but we would like recognition of the</p> <p>12 fact that our situation is somewhat unique.</p> <p>13 We disagree with the idea of the</p> <p>14 augmentation of the Bortz study. We have been</p> <p>15 as a party dealing with the Bortz study for a</p> <p>16 number of years. We have some insight into</p> <p>17 constant sum surveys. We have done our own in</p> <p>18 the past. Ours was different because we asked</p> <p>19 about programming within signals, we didn't try</p> <p>20 collapse all the programming across signals.</p> <p>21 During this time period, as Public</p> <p>22 Television pointed out in their closing, the</p> <p>23 task being put to the cable operators in the</p> <p>24 Bortz survey was incredibly complex because of</p> <p>25 the adoption of subgrouping under STELA. So</p>
4481	4483
<p>1 Our approach is that -- our response</p> <p>2 to Dr. Crawford is it's wonderful; we still</p> <p>3 think that it ought to be taken into</p> <p>4 consideration that our segment of the country</p> <p>5 has a different market component than the</p> <p>6 remainder of the country. And so Dr. George</p> <p>7 proposed certain modifications to</p> <p>8 Dr. Crawford's results.</p> <p>9 I mean, we've listened Dr. Crawford's</p> <p>10 responses, Dr. Israel's responses to that, and</p> <p>11 can understand that the idea that this puts us</p> <p>12 in a unique situation. But the fact remains</p> <p>13 that in this zone, there is a different</p> <p>14 marketplace. And it runs all the way across</p> <p>15 the country. There is this unique type of</p> <p>16 programming that is available.</p> <p>17 And I'm not going to tell you that all</p> <p>18 the Canadian stations are the same. They are</p> <p>19 not, obviously. There are the CBC stations</p> <p>20 which are the public broadcaster in Canada. It</p> <p>21 is much more like a U.S. network station down</p> <p>22 here, except that it is Canadian programming.</p> <p>23 And then there are the private broadcasters in</p> <p>24 Canada that have a substantial amount of U.S.</p> <p>25 programming and operate much more like a U.S.</p>	<p>1 suddenly you have multiple little mini cable</p> <p>2 systems all operating together with different</p> <p>3 cable lineups, television lineups. And somehow</p> <p>4 or another the person responding is supposed to</p> <p>5 keep this in mind and if you're a Public</p> <p>6 Television station or a Canadian station, it's</p> <p>7 not like -- let me step back.</p> <p>8 If you were only surveying U.S.</p> <p>9 commercial stations, if Bortz was limited to</p> <p>10 U.S. commercial stations the way it was back in</p> <p>11 the beginning when they first started the Bortz</p> <p>12 survey, then arguably all you would be focused</p> <p>13 on is the categories of Joint Sports,</p> <p>14 Commercial Television, Program Suppliers and</p> <p>15 Devotionals, which is the programming on those</p> <p>16 stations.</p> <p>17 So whether or not such and such</p> <p>18 station had more or less or whatever, at least</p> <p>19 you would be focused on just -- on the</p> <p>20 collapsing those stations and the programming</p> <p>21 on those stations. But when you include Public</p> <p>22 Television and the Canadians, now it is a whole</p> <p>23 different animal because you have to keep in</p> <p>24 mind was Public Television station offered to</p> <p>25 all the subscribers or just some of the</p>

<p style="text-align: right;">4484</p> <p>1 subscribers? Were there multiple Public 2 Television stations to these subscribers and 3 less to these subscribers? And the same with 4 the Canadians. So it's become a very complex 5 task, in our opinion. 6 And furthermore, as Dr. Conrad 7 testified, the whole thing is premised upon a 8 situation where you are asking for a valuation 9 of these programming categories to these 10 signals, which are completely different. I 11 liked his term: An unnatural category. 12 If the Bortz study, to put everybody 13 in the same ground, would really to have start 14 off the survey what is it the relative value of 15 the U.S. commercial stations versus the Public 16 Television stations versus the Canadian 17 stations? Now you're asking for the same 18 thing. And then you have to go inside and ask 19 about the programming. 20 Now, I appreciate that that would make 21 it a much longer, more complicated study. And 22 quite frankly, whether or not it would even be 23 worth it for Joint Sports Claimants or 24 Mr. Bortz -- Mr. Trautman to undertake a study 25 like that. But that is the complexity of the</p> <p style="text-align: right;">4485</p> <p>1 complication that is caused by including the 2 Public Television stations and the Canadian 3 stations in the survey. 4 It's been an issue we've talked about 5 many times. And the Bortz survey was not 6 applied to the Canadians until '04-'05. It was 7 the augmented Bortz was cited as a base for our 8 award. And we think that due to the complexity 9 that's been introduced, that it doesn't make 10 sense to use it as a base for our award in this 11 proceeding. 12 Further, the augmentation is entirely 13 dependent on the number of systems that have a 14 Public Television-only or Canadian station-only 15 that were part of the sample. So not very many 16 -- not many of those types of operators got 17 included there is not going to be much 18 augmentation, so you are left with the flawed 19 results of the base survey itself. 20 As I said, this is something that the 21 Canadians have been dealing with for a long 22 time. We are a small group, we are fairly 23 unique, our programming is on Canadian signals 24 only. Cable operators have to choose to carry 25 our signal to get our programming. We are not</p>	<p style="text-align: right;">4486</p> <p>1 just some little segment of programming that is 2 included on someone else's signals. 3 That carriage evidence and the royalty 4 payments is definitely direct evidence of a 5 demand for the Canadian programming. There 6 can't be a doubt; there can't be this idea 7 that, well, when they picked up that signal, 8 they didn't really care about your programming. 9 You were just an afterthought. They pick up 10 our signals. And that fact, in and of itself, 11 is contradictory to the Bortz results. Where 12 Bortz treats us as well under 1 percent, even 13 though the number of systems that carry us, the 14 percentage of subscribers that receive us, the 15 amount of royalty payments paid under the fee 16 generation system, are all substantially higher 17 than those numbers. 18 So in closing, we would urge that in 19 making an award for the Canadians, you start 20 with Mr. Crawford's regression and take into 21 consideration our arguments and Dr. George's 22 arguments that there should be an upward 23 adjustment. 24 But we think that would be the fairest 25 outcome for us, and using Dr. Crawford's</p> <p style="text-align: right;">4487</p> <p>1 results would then allow an award to be made to 2 all the parties. Thank you. 3 JUDGE BARNETT: Thank you. 4 Who is speaking for the Devotionals? 5 MR. MACLEAN: I am, your Honor. 6 JUDGE BARNETT: Are you reserving time 7 for rebuttal? 8 MR. MacLEAN: I would request 9 3 minutes, your Honor. 10 JUDGE BARNETT: In that case, let's 11 take our noon recess. We will take both the 12 Devotionals and Program Suppliers after the 13 break. So return at 12:50. Thank you. 14 (A recess was taken at 11:52 a.m., 15 after which the trial resumed at 12:58 p.m.) 16 17 18 19 20 21 22 23 24 25</p>
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<p>1 AFTERNOON SESSION</p> <p>2 JUDGE BARNETT: Mr. MacLean, I see you</p> <p>3 have your three C's up. Just sort of a</p> <p>4 heads-up, Ms. Brynteson, the court reporter who</p> <p>5 is to relieve Mr. Strickland, is running a</p> <p>6 little late. So we might have a break while</p> <p>7 the court reporters switch out. But this is</p> <p>8 your time.</p> <p>9 CLOSING ARGUMENT OF SETTLING DEVOTIONAL CLAIMANTS</p> <p>10 MR. MacLEAN: Thank you, your Honor.</p> <p>11 And since you have already seen my three C's</p> <p>12 slide, I can just skip through it. Actually, I</p> <p>13 just wanted to reemphasize here that the three</p> <p>14 Cs of consistency, confidence and certainty, is</p> <p>15 what the SDC has consistently asked for in</p> <p>16 these proceedings. And because it relates</p> <p>17 directly to this question, I wanted to address</p> <p>18 Judge Strickler's question from the beginning</p> <p>19 of the proceeding here today relating to the</p> <p>20 Judges' obligation under the statute to act in</p> <p>21 accordance with prior determinations.</p> <p>22 And although we have all used the</p> <p>23 phrase precedent a little bit loosely, I think</p> <p>24 Judge Strickler's question gets to the point</p> <p>25 that precedent usually applies to decisions of</p>	<p>1 two circumstances is met. First of all there</p> <p>2 have been changed circumstances from prior</p> <p>3 proceedings, or second, evidence on the record</p> <p>4 that requires prior conclusions to be modified.</p> <p>5 So your prior determinations are not</p> <p>6 written in stone, however, we also -- the</p> <p>7 statutory intent is that we not and you not</p> <p>8 have to reinvent the wheel every time we go</p> <p>9 through this.</p> <p>10 So with that I will get into my</p> <p>11 principal presentation here. Slide, please.</p> <p>12 So this is what I'm going to talk</p> <p>13 about today. First, I'm going to focus on the</p> <p>14 fee-based regressions and I will spend most of</p> <p>15 my time on this. I do have a lot of slides,</p> <p>16 but I'd much rather answer your questions than</p> <p>17 go through all of my slides. So if you have</p> <p>18 questions -- it is actually not a particularly</p> <p>19 complicated subject, but it is a subject on</p> <p>20 which most of us are not accustomed to thinking</p> <p>21 all the time. So I do want to address those.</p> <p>22 I'm probably not going to spend any</p> <p>23 time on the viewing hours study, because</p> <p>24 frankly I don't have anything to add to what</p> <p>25 has already been said today. I probably won't</p>
4489	4491
<p>1 law, but entitled to stare decisis. But that</p> <p>2 is not what the statute says. The statute says</p> <p>3 that the Copyright Royalty Judges will act in</p> <p>4 accordance with prior determinations. And that</p> <p>5 is Section 803(a).</p> <p>6 And what the legislative history</p> <p>7 specifically goes to show is that there was a</p> <p>8 frustration with earlier versions, with Judges'</p> <p>9 predecessors, frankly, in that different panels</p> <p>10 would come on, give inconsistent</p> <p>11 determinations. There would be -- you never</p> <p>12 really knew what the panels were going to do</p> <p>13 next. So this Tribunal here is one of the very</p> <p>14 few Tribunals, in fact, quite possibly the only</p> <p>15 Tribunal in the country whose statute, rather</p> <p>16 than merely common law, puts into the</p> <p>17 requirements that you act in accordance with</p> <p>18 prior determinations.</p> <p>19 And you have precedent on this issue.</p> <p>20 Because in the 1988 to '99 Phase I decision,</p> <p>21 which is in the Federal Register 69 FR 3606, it</p> <p>22 was explained that the Judges -- or at that</p> <p>23 time it was still the CARP -- should follow</p> <p>24 prior determinations that would include the</p> <p>25 basis for prior determinations, unless one of</p>	<p>1 spend any time on that, unless of course you</p> <p>2 have questions.</p> <p>3 Third, I will go to the survey</p> <p>4 methodologies. We believe that the surveys are</p> <p>5 the mostly reliable, robust, and reasonable</p> <p>6 approach in these proceedings. And we also</p> <p>7 believe that the Horowitz survey does provide</p> <p>8 some usefulness to the Bortz survey both in</p> <p>9 corroborating the Bortz survey and giving it</p> <p>10 some sense of the direction and magnitude of</p> <p>11 certain potential biases in one of those</p> <p>12 surveys.</p> <p>13 And finally, time permitting, I may</p> <p>14 address the Public Television changed</p> <p>15 circumstances argument.</p> <p>16 With regard to fee-based regressions,</p> <p>17 there are basically two points that I want to</p> <p>18 make. The first -- and this is the most</p> <p>19 important point -- correlation with fees paid</p> <p>20 is not value. That is a misinterpretation of</p> <p>21 the coefficients. And I will explain that</p> <p>22 later. But in short, interpreting these</p> <p>23 coefficients as measures of marginal value</p> <p>24 leads to an absurd results and is simply not</p> <p>25 the correct econometric reasoning to put into</p>

<p style="text-align: right;">4492</p> <p>1 this.</p> <p>2 The second point is that due to the</p> <p>3 sensitivity and frankly the selection that has</p> <p>4 occurred in the course of developing these</p> <p>5 regressions, anything can be, quote,</p> <p>6 "corroborated" by these regressions. They are</p> <p>7 simply not reliable and robust.</p> <p>8 Slide. Here is the key question that</p> <p>9 any of the proponents of the fee-based</p> <p>10 regressions need to be able to answer. And a</p> <p>11 few of them have some time remaining on</p> <p>12 rebuttal and they can try to answer, but I</p> <p>13 submit that they cannot. Why would a lower fee</p> <p>14 paying system or subscriber group choose to</p> <p>15 retransmit more minutes of programming that it</p> <p>16 does not value? Because ultimately at the end</p> <p>17 of the day, that's what a correlation means.</p> <p>18 All else being equal -- and what all else being</p> <p>19 equal means depends on the control variables --</p> <p>20 but every correlation means all else being</p> <p>21 equal, those lower fee paying systems are</p> <p>22 retransmitting more minutes of those programs</p> <p>23 that get lower value coefficients than higher</p> <p>24 fee paying systems are retransmitting. That's</p> <p>25 what it means in every single case. And so the</p>	<p style="text-align: right;">4494</p> <p>1 royalties are paid disproportionately by bigger</p> <p>2 systems or bigger subscriber groups who are</p> <p>3 paying more royalties into the system with the</p> <p>4 coefficients that they say suggest a particular</p> <p>5 allocation?</p> <p>6 MR. MacLEAN: I understand that, your</p> <p>7 Honor. And it's all about what the coefficient</p> <p>8 means. Okay? Go to the next slide. I can</p> <p>9 demonstrate this graphically. You have seen</p> <p>10 this before. And what this shows on the Y axis</p> <p>11 column is the cost. But remember in this</p> <p>12 circumstance, cost isn't a market price. Cost</p> <p>13 is in every case simply calculated as a</p> <p>14 percentage of receipts. What percentage that</p> <p>15 is can go up or down based on the number of</p> <p>16 DSEs, and in some cases the type of DSE. But</p> <p>17 it is always, always a percentage of receipts.</p> <p>18 This isn't a case -- importantly, this</p> <p>19 isn't the case where, for example, lower</p> <p>20 percentage fee receipt systems are</p> <p>21 retransmitting more minutes of, for example in</p> <p>22 this example, Devotional programming because</p> <p>23 it's cheaper. From the system's point of view</p> <p>24 there is no cost distinction between these</p> <p>25 categories of programming, except in very</p>
<p style="text-align: right;">4493</p> <p>1 question is what is the economic reasoning that</p> <p>2 would explain that?</p> <p>3 Next slide. The answer to this</p> <p>4 question: It wouldn't. A lower-fee paying</p> <p>5 system or subscriber group would not</p> <p>6 retransmit, would not choose to retransmit more</p> <p>7 minutes of a category of programming if they</p> <p>8 didn't value it.</p> <p>9 JUDGE STRICKLER: You say if they</p> <p>10 don't value it. But could a system -- I'm</p> <p>11 going to use a word that maybe is not apt --</p> <p>12 isn't that a subjective value? That is to say</p> <p>13 the value to the subscribers -- that is why</p> <p>14 subjective is a bad word -- value to the</p> <p>15 subscribers to that group or to that system.</p> <p>16 So if I understand -- I read your papers as</p> <p>17 well -- if I understand your point, you are</p> <p>18 saying that value doesn't equate to fee paying</p> <p>19 and therefore it doesn't equate to royalties.</p> <p>20 But what we are trying to do here is allocate</p> <p>21 royalties. That being the case, why should we</p> <p>22 be concerned with value to a particular</p> <p>23 subscriber group or system?</p> <p>24 What we are trying to do is figure out</p> <p>25 how to allocate the royalties and certain</p>	<p style="text-align: right;">4495</p> <p>1 special cases like network or Public Television</p> <p>2 programs. There is no difference in cost.</p> <p>3 So if in this example lower-fee paying</p> <p>4 systems are retransmitting more minutes of</p> <p>5 Devotional programs, it is not an indicator of</p> <p>6 negative value as each of the regressions would</p> <p>7 interpret a downward sloping coefficient. It's</p> <p>8 not that they are pulling down the value of the</p> <p>9 systems by including minutes that have negative</p> <p>10 value. It's because basically there is a niche</p> <p>11 market. Not only among subscribers, but also</p> <p>12 potentially among systems and subscriber groups</p> <p>13 themselves. And there are communities,</p> <p>14 subscriber groups, systems out there that do</p> <p>15 value all of these kinds of programming.</p> <p>16 JUDGE STRICKLER: Aren't they</p> <p>17 incorporated in all of the Waldfoegel type</p> <p>18 regressions, those systems?</p> <p>19 MR. MacLEAN: Well, first not</p> <p>20 necessarily, and I'll get to that in a second.</p> <p>21 But secondly that is not really the point I'm</p> <p>22 making. The point I'm making has to do with</p> <p>23 interpretation of the coefficients. If all</p> <p>24 systems valued a category of programming</p> <p>25 equally, and more importantly retransmitted a</p>

4496	4498
<p>1 particular type of programming in more or less 2 equal numbers of minutes -- let's say everybody 3 thought, oh, sports is great. Let's retransmit 4 all of the minutes of sports we can. 5 JUDGE STRICKLER: You would have no 6 variation and no regression. 7 MR. MacLEAN: Exactly. 8 JUDGE STRICKLER: No meaningful 9 regression. 10 MR. MacLEAN: Exactly. You would have 11 no variation and you would have a very low 12 coefficient or an insignificant coefficient. 13 But in fact, that would indicate everybody 14 values it or potentially nobody values it. 15 So, yes, absolutely there is likely 16 variation among systems as to how much they 17 value different kinds of programming. And also 18 there are variations among systems and 19 subscriber groups about availability of kinds 20 of programming, both availability in total and 21 also availability as a distant signal, as 22 opposed to as a local signal, which is another 23 issue. 24 My point is simply that that variation 25 doesn't tell you much about value as such.</p>	<p>1 say -- I'm not saying a negative coefficient is 2 necessarily a negative value -- but he still 3 uses it as negative value when he calculates 4 his shares, but he adjusts it up to zero 5 saying, well, there is notionally no way we can 6 give a negative share. 7 Dr. George says, yeah, it's negative 8 value. And she actually calculates negative 9 shares in her regression. Dr. Crawford says he 10 doesn't get negative coefficients. That is not 11 accurate and I will get to that in a second. 12 But Dr. Crawford says he doesn't get negative 13 coefficients. But he is still interpreting the 14 slope of the line as a measure of marginal 15 value. 16 So in Dr. Crawford's view, a more or 17 less flat line is going to be zero value, even 18 though we just talked about a more or less flat 19 line could mean that everybody values the 20 program. And he thinks of a positive sloping 21 line as a measure of positive value, even 22 though as you see in this slide in front of 23 you, a positive sloping line actually means -- 24 necessarily means that fewer of the lower 25 receipt systems -- that is to say the lower fee</p>
4497	4499
<p>1 What it tells you is that these minutes are 2 being retransmitted either based on 3 availability or based on preferences of the 4 system, or for some other reason more by fee 5 paying systems at the lower end. 6 If you interpret that coefficient as 7 negative value then you wouldn't be saying 8 these lower fee paying systems do value the 9 programming. You would be saying, if you 10 interpreted it as negative value, there is a 11 negative value to that program. If you 12 interpret that negative sloping line as a 13 negative value, then that is just an incorrect 14 interpretation. 15 It tells you something about the 16 characteristics of the system that are 17 retransmitting these minutes. 18 If we could go to the next slide, 19 please. 20 JUDGE STRICKLER: Does anybody who 21 supports a Waldfogel regression approach say 22 that the coefficient reflects negative value to 23 that category of programming if it is a 24 negative coefficient? 25 MR. MacLEAN: Now, Dr. Israel will</p>	<p>1 paying systems, are apparently retransmitting 2 fewer of those minutes. If those systems 3 started retransmitting more minutes of a 4 category of programming, that would actually 5 bring the coefficient down, even though what it 6 actually indicates is that those systems value 7 that programming, presumably, since they are 8 choosing to retransmit. 9 JUDGE STRICKLER: Let's go back to 10 perhaps a basic principle. How do you define 11 value in your analysis? 12 MR. MacLEAN: Reasonable fair market 13 value. Fair market value -- 14 JUDGE STRICKLER: I'm talking about it 15 not in terms of the standard that we apply, but 16 you're talking about value here in this chart. 17 What is the value that you are referring to? 18 You say this -- 19 MR. MacLEAN: I'm saying that this 20 chart doesn't show value. What Dr. Crawford 21 says, and the other expert presenting 22 regressions say, this slope, the slope of this 23 line -- 24 JUDGE STRICKLER: Which line? Either 25 line.</p>

<p style="text-align: right;">4500</p> <p>1 MR. MacLEAN: Either line. The slope 2 of the line, whatever the linear regression 3 tells you the slope is, that that is the 4 measure of a marginal value per minute. And 5 you could take that measure -- Dr. Crawford has 6 to do a little bit of adjustment because of the 7 law of transformation. But that point is 8 basically, that coefficient, that slope 9 translates to a measure of marginal value per 10 minute. Multiply that by a number of minutes, 11 boom. You've got a value. 12 JUDGE STRICKLER: Where would we find 13 this analysis in your testimony? 14 MR. MacLEAN: That's explained in 15 Dr. Crawford's written testimony and his oral 16 testimony and Dr. Israel's written testimony 17 and Dr. Israel's oral testimony. They all 18 explain how they do this exactly, and that's 19 how they do it. 20 JUDGE STRICKLER: No, I'm not talking 21 about what they do. The criticism that you are 22 launching here in using this demonstrative, if 23 you will, in whose testimony will we find it? 24 MR. MacLEAN: Dr. Ervin's testimony. 25 JUDGE STRICKLER: And that's cited in</p>	<p style="text-align: right;">4502</p> <p>1 JUDGE STRICKLER: Does Dr. Erdem have 2 this particular demonstrative in his own 3 papers? 4 MR. MacLEAN: Not this drawing. This 5 is a drawing that I did with Dr. Crawford while 6 we were up. 7 JUDGE STRICKLER: And he has nothing 8 similar to this. Your argument is it is 9 explained in words? 10 MR. MacLEAN: Correct. 11 JUDGE STRICKLER: But the depiction 12 that we see here, that is not in his papers? 13 MR. MacLEAN: That's correct. This is 14 to try to make it more clear for you and 15 everybody here to understand what I am saying, 16 which is that the coefficient measures 17 correlation between, on the one hand, fees 18 paid, and on the other hand, number of minutes. 19 JUDGE STRICKLER: And that is 20 consistent with Dr. Erdem's testimony? 21 MR. MacLEAN: And Dr. Crawford's and 22 Dr. Israel's. 23 JUDGE STRICKLER: But Dr. Erdem was 24 your witness. He didn't want to make it clear? 25 Why wasn't it in his papers?</p>
<p style="text-align: right;">4501</p> <p>1 your papers, both your proposed and response? 2 MR. MacLEAN: Yes, your Honor. It's 3 in Dr. Ervin's testimony. It's also in 4 Dr. Crawford's oral testimony when I 5 cross-examined him. This is the slide, in 6 fact, from my cross-examination of 7 Dr. Crawford. 8 JUDGE STRICKLER: I know it's your 9 slide. But I'm wondering if it's an expert's 10 slide, one that any expert has adopted. That 11 is my question. 12 MR. MacLEAN: Well, I would argue that 13 Dr. Crawford has by answering my questions 14 about it. This is what a coefficient means. A 15 coefficient is correlation and everybody has 16 agreed with that. 17 JUDGE STRICKLER: Well, my -- my 18 question at this point is pretty much now an 19 evidentiary question. You find this particular 20 demonstrative to be explanatory? 21 MR. MacLEAN: Yes. 22 JUDGE STRICKLER: And you say it is 23 backed up by, among others, your 1:47 24 Dr. Erdem? 25 MR. MacLEAN: Yes.</p>	<p style="text-align: right;">4503</p> <p>1 MR. MacLEAN: I don't know how to 2 answer that, your Honor. I mean, Dr. Erdem 3 explained it in words. I'm trying to help 4 explain it in pictures, and as I did with 5 Dr. Crawford. But it's one way or the other. 6 Dr. Crawford did explain exactly what I'm 7 explaining. If, for example, lower fee paying 8 systems were to drop CTV programming, were to 9 retransmit -- I'm sorry -- were to add CTV 10 programming. So we really value the CTV 11 programming. We are going to add on. We are 12 going to retransmit more minutes. That is 13 going to cause CTV's coefficient in this 14 example to go down, not up. 15 What it actually indicates on a review 16 of preferences theory is that those systems are 17 actually valuing that more. That is all 18 completely explained in Dr. Erdem's oral 19 testimony. 20 JUDGE STRICKLER: Thank you. 21 MR. MacLEAN: If we could go to the 22 next slide, please. 23 If you were to interpret these 24 negative coefficients, for example, as negative 25 value, you get really absurd results. For</p>

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<p>1 example, both Dr. Israel's regression and</p> <p>2 Dr. Crawford's regression come up with negative</p> <p>3 coefficients. Dr. Israel's is expressed and</p> <p>4 Dr. Crawford's is implied in the number of</p> <p>5 distant signals and the number of nonduplicated</p> <p>6 minutes, they get negative coefficients for</p> <p>7 network programming.</p> <p>8 That makes no sense as a matter of</p> <p>9 market value, because we know network</p> <p>10 programming is very valuable. But it makes</p> <p>11 absolute sense when you understand these</p> <p>12 coefficients as being correlation between fees</p> <p>13 paid and the number of minutes retransmitted.</p> <p>14 Because network minutes are most likely to be</p> <p>15 retransmitted by those systems that are in</p> <p>16 markets that don't have their own local</p> <p>17 station. It makes complete sense, but only if</p> <p>18 you correctly understand these coefficients.</p> <p>19 JUDGE STRICKLER: What is your</p> <p>20 position as to what the coefficients mean if</p> <p>21 they are not representing relative value?</p> <p>22 MR. MacLEAN: They are correlated with</p> <p>23 characteristics of the system. What they tell</p> <p>24 you is -- if there is a negative correlation,</p> <p>25 what it tells you is that on average, lower-fee</p>	<p>1 error -- and system receipts vary depending on</p> <p>2 the size of the system or the size of the</p> <p>3 subscriber groups within the system; correct?</p> <p>4 MR. MacLEAN: That's true. But you</p> <p>5 also have to remember that there are different</p> <p>6 interpretations depending on whether you use</p> <p>7 Dr. Crawford's regression or Dr. Israel's</p> <p>8 regression. That is one of the factors that</p> <p>9 will cause system receipts to vary.</p> <p>10 JUDGE STRICKLER: Because one uses</p> <p>11 subscriber groups and one uses systems.</p> <p>12 MR. MacLEAN: That's one difference.</p> <p>13 Another difference is Dr. Israel uses a</p> <p>14 level-level regression. This is very important</p> <p>15 and one that I definitely wanted to explain.</p> <p>16 Dr. Crawford uses a log-level regression. That</p> <p>17 is to say his dependent variable is log</p> <p>18 transformed.</p> <p>19 JUDGE STRICKLER: Let's just stay with</p> <p>20 the system. I know you are going to get into</p> <p>21 that. System receipts vary by the size of the</p> <p>22 system. So larger systems are responsible for</p> <p>23 more of the total royalties that are paid into</p> <p>24 the pool. And isn't the point of a Waldfogel</p> <p>25 regression to say in the larger systems we can</p>
4505	4507
<p>1 paying systems are retransmitting more of those</p> <p>2 minutes than higher-fee paying systems are.</p> <p>3 That is what a negative coefficient means.</p> <p>4 JUDGE STRICKLER: My question was more</p> <p>5 broad. Excuse me. What do the coefficients</p> <p>6 mean if they don't depict relative market</p> <p>7 value, as the Waldfogel regression suggests,</p> <p>8 once you multiply it by the number of</p> <p>9 subscribers?</p> <p>10 MR. MacLEAN: It means there are</p> <p>11 variations in system receipts that may be</p> <p>12 caused by any number of factors. We presented</p> <p>13 geography as an important factor, but not the</p> <p>14 only factor. But it means that system receipts</p> <p>15 are varying in a systematic way and that</p> <p>16 retransmission of minutes is also varying in a</p> <p>17 systematic way.</p> <p>18 And that could be based on system</p> <p>19 preferences, different preferences, and for</p> <p>20 example, different geographies -- I am just</p> <p>21 presenting that as one possible reason -- or</p> <p>22 signal availability. That is a very important</p> <p>23 one.</p> <p>24 JUDGE STRICKLER: And system</p> <p>25 receipts -- correct me if you think I'm in</p>	<p>1 see what their choices were, so the argument</p> <p>2 goes, we can find the implicit choices that are</p> <p>3 being made because they decide to rebroadcast a</p> <p>4 distant signal -- a local signal distantly and</p> <p>5 we can find such a percent of total programming</p> <p>6 that is Program Suppliers, a certain percent</p> <p>7 that's Devotional, certain percent for Joint</p> <p>8 Sports, et cetera.</p> <p>9 Isn't that their argument as to why it</p> <p>10 is okay that there is a correlation with system</p> <p>11 receipts in the coefficient? Because that is</p> <p>12 just taking to the total royalty pool, which is</p> <p>13 what we are here to allocate. Do you agree</p> <p>14 with me that that is their argument?</p> <p>15 MR. MacLEAN: I'm not sure if I want</p> <p>16 to characterize their argument. But I will say</p> <p>17 if that's their argument --</p> <p>18 JUDGE STRICKLER: You can characterize</p> <p>19 their argument. Tell me.</p> <p>20 MR. MacLEAN: No, I don't think that</p> <p>21 is their argument. Because if that were the</p> <p>22 case -- if that were the case, then the</p> <p>23 approach would be: Look at the available</p> <p>24 signals and look at the characteristics that</p> <p>25 make a signal more likely to be picked up by a</p>

<p style="text-align: right;">4508</p> <p>1 system or less likely to be picked up by the 2 system.</p> <p>3 The problem is none of the regressions 4 look at the content of signals that are not 5 retransmitted. So none of the regressions 6 looked at: Is it more or less probable that a 7 system at this fee level is going to retransmit 8 this station with this content or this station? 9 None of the regressions looked at that.</p> <p>10 JUDGE STRICKLER: You made that point 11 during the presentation of your case. Are you 12 saying that you have to do that to get relative 13 value in the system receipts, or can you do it 14 just doing it the way I understand Waldfogel 15 regressions do it, looking at the weighting of 16 the different categories that are chosen is to 17 figure out relative value?</p> <p>18 I understand your point. Are you 19 saying that that's the only way to do it? You 20 would have to compare what was chosen with what 21 was not chosen?</p> <p>22 MR. MacLEAN: I'm saying that is the 23 only way to do it if the goal is to figure out 24 what makes a system at any given fee level more 25 or less likely to choose to retransmit a given</p>	<p style="text-align: right;">4510</p> <p>1 negative coefficient as a negative value. And 2 every expert who has presented would interpret 3 a negative coefficient as negative value, even 4 though Dr. Israel admits that a negative 5 coefficient doesn't mean it literally has 6 negative value.</p> <p>7 JUDGE STRICKLER: Didn't one of the 8 experts -- I may get this wrong -- Dr. George 9 indicate that she thought that a negative 10 coefficient might be indicative of an 11 opportunity cost, that you are losing overall 12 value by your particular selection of a program 13 type relative to another program type that 14 could have enlarged your overall value? So 15 it's not that it costs you money.</p> <p>16 Certainly if you're broadcasting a 17 local station distantly that is more heavily 18 weighted towards Devotional, for example, it 19 may increase value -- and probably does so the 20 argument would go -- in that particular area. 21 But relative to what it might do overall, on 22 average it tends to lower the value. So the 23 coefficient is an opportunity cost, if I'm 24 remembering her testimony correctly. And even 25 if I am, I may be mischaracterizing it.</p>
<p style="text-align: right;">4509</p> <p>1 station at that price.</p> <p>2 JUDGE STRICKLER: Is that also in 3 Dr. Erdem's testimony?</p> <p>4 MR. MacLEAN: That was in 5 Dr. Crawford's testimony.</p> <p>6 JUDGE STRICKLER: Dr. Crawford adopted 7 what you just said, that the proper way to 8 figure out the value in a Waldfogel type 9 regression is to analyze the programs that were 10 not selected? I don't remember him saying 11 that. Maybe I need to go back to the record.</p> <p>12 MR. MacLEAN: We presented some 13 testimony with Dr. Crawford relating to an 14 article that he published previously in which 15 he proposed something like what we just 16 described as a valuation measure; looked at the 17 likelihood of a station being carried on a 18 regional network.</p> <p>19 Now, did Dr. Erdem in his testimony 20 say this is the way you have to do it? 21 Dr. Erdem didn't propose a way to do it. He 22 said you can't do it the way they do it because 23 that negative correlation doesn't mean negative 24 value. That is really the fundamental point. 25 It leads to absurd results if you interpret a</p>	<p style="text-align: right;">4511</p> <p>1 But do you recall the opportunity cost 2 explanation of the negative coefficient?</p> <p>3 MR. MacLEAN: I do not recall that 4 particular explanation.</p> <p>5 JUDGE STRICKLER: Your recollection 6 may be better than mine. I will check the 7 record.</p> <p>8 MR. MacLEAN: I don't want to try to 9 recall Dr. George's testimony without recalling 10 exactly what you're referring to. However, 11 let's assume for a moment that she did say 12 something like that. That would still be 13 inconsistent with the conclusion of negative 14 value, because even -- because there is still 15 positive value if you are retransmitting some 16 program in place of another program.</p> <p>17 But the other point I want to make is 18 remember this coefficient doesn't reflect a 19 choice to pay less or more for a particular 20 station. It reflects a choice to buy a 21 particular system or subscriber group versus 22 another system or subscriber group with 23 different characteristics. That's what the 24 coefficient reflects.</p> <p>25 And that's really the basic point I'm</p>

4512	4514
<p>1 trying to get at. That if you've got these 2 lower-fee systems retransmitting these minutes 3 of programming, that doesn't mean -- A, it 4 doesn't mean that the higher-fee systems don't 5 value it. It just means that the higher-fee 6 systems aren't retransmitting as many minutes. 7 It certainly doesn't mean that that is negative 8 value and it doesn't say anything about really 9 opportunity costs either. Because those lower 10 fee systems, for whatever reasons, are 11 apparently choosing to retransmit more minutes. 12 If I could ask for slide 12, please. 13 This is a map from Mr. Sanders' testimony in 14 which he shows -- they say Gallop polls -- 15 relative religiosity across different 16 geographies. And what you see is that there 17 are variations across geographies about 18 relative levels of religiosity. It is 19 possible -- and I don't claim to be able to 20 explain every single aspect of the correlation, 21 but it is possible in these markets that are 22 more green that these systems and subscriber 23 groups are valuing Devotional programming more. 24 JUDGE STRICKLER: That sort of gets 25 back to my question. When you say they are</p>	<p>1 is lower relative to sports, say, then you 2 would have more money flowing in in terms of 3 royalties, which are a function of receipts, as 4 you acknowledge. You have more money flowing 5 into the pool of royalties coming from the 6 areas where people have not only a higher 7 willingness to pay, but more importantly, an 8 ability to pay, which gets translated into 9 higher fees and maybe also just more people, 10 because that amount is then multiplied by the 11 number of subscribers; right? 12 So you end up having a lot of people 13 paying somewhat more, compared to people in the 14 darker green that arguably -- not necessarily 15 the case, because we are looking at correlation 16 here, not causation -- arguably people who are 17 paying less, because they would have paid a lot 18 more if they could, but they didn't. 19 Isn't that what the Waldfoegel 20 regression, in part, is showing us? So value 21 comes out not of just a revealed preference but 22 a revealed ability to pay. 23 MR. MacLEAN: It is possible that you 24 could get a correlation based on an ability to 25 pay. But it is also possible that that</p>
4513	4515
<p>1 valuing Devotional programming more, what does 2 it mean in economic terms when you say they are 3 valuing it? Are you saying they have a higher 4 willingness to pay for Devotional programming 5 than, say, sports? Is that your point? The 6 willingness-to-pay concept? 7 MR. MacLEAN: Possibly higher 8 willingness to pay than sports. But what is 9 really important is higher willingness to pay 10 than a system maybe in a different geography. 11 JUDGE STRICKLER: Here is where we get 12 to the issue of the fees themselves, because 13 willingness to pay has nested within it, and 14 not often discussed, ability to pay. So people 15 may have a high willingness to pay for 16 something, but lacking the ability to pay for 17 it. Then that is subsumed in willingness. The 18 total fees that will be paid in those systems 19 will be lower because the people may have lower 20 incomes, lower wealth, what have you. Whereas 21 the areas that are lighter green, if it turns 22 out to be the case -- I think this would be one 23 of the fixed effects in these regressions -- 24 income was higher than if the complement of 25 stations -- of programs is such that Devotional</p>	<p>1 variation could tell you something about value, 2 although you do have to make a couple of 3 inferential leaps. 4 However, a lower payment does not mean 5 a negative value. And that's the key point 6 here. That -- this is exactly the point that 7 Dr. Erdem made when he was testifying. If you 8 simply multiply that coefficient by number of 9 minutes, you are implicitly saying if I find a 10 negative correlation -- that is to say if I 11 find that low-receipt systems are 12 retransmitting more of this kind of minutes of 13 programming -- that is not lower value; that is 14 negative value. That is what that 15 interpretation would implicitly say. 16 So yes, you're right. And like I 17 said, there is some information about the 18 characteristics of the system. And there may 19 be, if you make enough inferential leaps, some 20 ways to get from those characteristics of the 21 system to get to something that has something 22 to do with value. But that is not the way that 23 any of these regressions are interpreting their 24 coefficient. And that's the point I want to 25 make.</p>

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<p>1 If I could go quickly to page 14, 2 slide 14. I want to make the point that 3 Dr. Crawford's regression -- actually, the 4 point was made that it gives positive and 5 statistically significant correlations for 6 everybody. Not true.</p> <p>7 Actually, let's go to 13, first. Once 8 you apply the level shift that we discussed ad 9 infinitum during his oral testimony, what you 10 will find is that he would find a negative 11 correlation with respect to Program Suppliers, 12 Public Television and Devotional Claimants once 13 you apply the statistically significant 14 coefficient for nonduplicated minutes. This is 15 precisely -- and next slide -- you could 16 actually do the exact same math with the number 17 of distant signals in his so-called initial 18 analysis simply by dividing that coefficient by 19 262,800. The point is -- and you get 20 essentially the same result.</p> <p>21 If we go to the next slide, please. 22 This is the very issue on which Dr. Crawford 23 admitted that he is not sure that his shares 24 are correct. And there at the bottom: "And 25 you are not sure that you don't? And I am not</p>	<p>1 correctly calculated precisely because he 2 doesn't -- he did not consider the fact that 3 when he controlled for the number of distant 4 signals in his so-called initial regression, 5 and the number of unduplicated minutes in his 6 alternative regression, that that is measuring 7 the coefficient, the correlation, when you add 8 a minute of programming while taking away a 9 minute of another kind of programming -- in his 10 case network programming or unduplicated 11 network programming, which as we said is 12 actually quite valuable, but gets a negative 13 coefficient.</p> <p>14 If you interpret these results -- a 15 negative coefficient as negative value, this 16 would imply that the entire royalty funds 17 should go to sports, CTV, and Canadian, and 18 that is an absurd result.</p> <p>19 And finally, if I could ask quickly to 20 look at slide 21. And this gets to the 21 question that I was saying earlier. There is a 22 difference in how Dr. Crawford controls for 23 subscribers and how Dr. Israel controls for 24 subscribers.</p> <p>25 Dr. Crawford failed to account for the</p>
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<p>1 sure that I don't." That is, I don't agree 2 with me that he should have taken into account 3 that level shift.</p> <p>4 PTV has said, no, Dr. Crawford did not 5 admit that his shares were wrong in 6 calculating. "I consider them both reasonable 7 justifications. I don't think Dr. Israel was 8 wrong in particular or that I was wrong in 9 particular." That is from PTV Findings of Fact 10 responses.</p> <p>11 Next slide. Here is the full quote. 12 "I think they are -- I consider them both 13 reasonable justifications. I don't think he 14 was wrong in particular or that I was wrong in 15 particular."</p> <p>16 "Question: Actually, you don't know 17 if you are wrong; right?"</p> <p>18 "Answer: Yes."</p> <p>19 Now, I agree with Mr. Stewart when he 20 says it would have been appropriate, for 21 example, for Program Suppliers to withdraw its 22 viewer hours study under the circumstances. 23 And I would submit that Dr. Crawford's 24 regression should be put in that same boat. 25 He doesn't know if his shares are</p>	<p>1 fact that his dependent variable is log 2 transformed. And because that is going to 3 relate to subscribers, as you said, the fee is 4 going to relate to subscribers, he should have 5 log transformed his independent variable for 6 the number of subscribers if he is going to 7 interpret it that way.</p> <p>8 So therefore, if you were to reject 9 everything I have said about the reason that 10 these regressions are not usable, and if you 11 were, therefore, to adopt Mr. Stewart's 12 suggestion that you should split the difference 13 between Bortz results and regression results 14 here, this 6 percent is the lower number that 15 you should use for CTV in making that 16 regression. When you correctly control for the 17 number of subscribers and otherwise adopt 18 Dr. Crawford's interpretation of the regression 19 results, CTV is highly sensitive to this 20 number-of-subscribers control.</p> <p>21 They say all you are doing is 22 replicating the fee formula. That's the 23 purpose of a control. To remove the influence 24 of a variable. To remove the influence of a 25 variable so you can isolate the influence of</p>

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<p>1 other variables. If you accept this 2 interpretation, then use the lower number for 3 CTV.</p> <p>4 I've also made the point -- and the 5 Judges are very familiar with it by now, I 6 won't belabor it because I'm out of time -- 7 Dr. Crawford's regression is selected. What 8 this means is he tried other regressions. He 9 rejected them because of their results.</p> <p>10 Statisticians call it phantom degrees of 11 freedom. To put it in more layman's terms, 12 it's just a statistical way of saying if you 13 look for something, you are going to find it.</p> <p>14 There are millions or even billions, 15 depending on how you count them, of different 16 possible solutions. The answers, the results 17 you get are highly sensitive to what you 18 select. And if you're selecting your results 19 -- your model based on results, you can 20 corroborate anything. I'm not saying he did it 21 in bad faith. You could do it in bad faith; 22 you could do it not in bad faith.</p> <p>23 If you look at these results and say 24 these results don't meet my expectations, let's 25 make this change. Ah, that's more like it.</p>	<p>1 sensitivity testing than Dr. Erdem?</p> <p>2 MR. MacLEAN: When I asked 3 Dr. Crawford about what sensitivity testing he 4 did, he referred back to the earlier 5 regressions.</p> <p>6 JUDGE STRICKLER: Are you talking 7 about the ones that were not produced?</p> <p>8 MR. MacLEAN: The ones that were not 9 produced. The ones that he considered and 10 rejected and then led ultimately to the 11 evolution through a selection process to the 12 final regressions that he presented.</p> <p>13 JUDGE STRICKLER: So it's your 14 understanding that in the record we have no 15 record of his sensitivity analyses?</p> <p>16 MR. MacLEAN: That is absolutely true.</p> <p>17 In conclusion, your Honor, we propose 18 using the Bortz results, modified as necessary 19 based on the Horowitz results and the 20 McLaughlin adjustments, as indicators of the 21 direction and magnitude of potential biases.</p> <p>22 The one hypothesis about a bias in 23 favor of the Devotionals that has been proposed 24 has not been established. Dr. Erdem proposed 25 his quality of means test, which shows no</p>
4521	4523
<p>1 Let's make this other change. Ah, that's what 2 I was expecting to see. There must have been 3 something wrong with my prior regression.</p> <p>4 If I'm doing that -- change, change, 5 change, change, change -- you get to the point 6 where: Oh, this is what I was expecting to 7 see. And then you stop, because it's always in 8 the last place you look for it.</p> <p>9 And Dr. Crawford, unlike the other 10 witnesses here, did not then do some 11 sensitivity tests. Unlike, for example, 12 Dr. Israel whose sensitivity tests showed that 13 in the presence of geographic controls, CTV and 14 sports both become statistically insignificant, 15 CTV becoming negatively statistically 16 significant.</p> <p>17 If you were to adopt Dr. Israel's 18 regression as a corroborative tool, you should 19 just go ahead and allocate the entire pool to 20 Program Suppliers and PTV, because they are the 21 only ones who get positive and statistically 22 significant results under that regression.</p> <p>23 JUDGE STRICKLER: Refresh my 24 recollection. Are you saying that Dr. Crawford 25 did no sensitivity testing or did different</p>	<p>1 statistically detectable systematic difference 2 across the years. It is nothing but a 3 hypothesis.</p> <p>4 We are the Devotional Claimants. We 5 believe in the scientific method and we 6 proposed a test. JSC has found some faults, or 7 has raised some alleged faults with this test. 8 But here is my final question. I will leave it 9 with that. Where is their test?</p> <p>10 We don't think the Judges should 11 speculate. The Bortz results provide 12 reasonable results. The Horowitz survey 13 provides a reasonable basis in which to examine 14 the possible direction and magnitudes of 15 potential biases. And between those results, 16 we believe there lies the best possible answer 17 that the Judges have before them.</p> <p>18 JUDGE BARNETT: Thank you, 19 Mr. MacLean.</p> <p>20 MR. MacLEAN: Thank you.</p> <p>21 JUDGE BARNETT: By my reckoning, we 22 have a little over an hour in rebuttal time. 23 So in order to give the court reporters an 24 opportunity to -- plus we have initial argument 25 from Program Suppliers.</p>

<p style="text-align: right;">4524</p> <p>1 MR. GARRETT: They waived.</p> <p>2 JUDGE BARNETT: They waived? Thank</p> <p>3 you. That is very thoughtful.</p> <p>4 At any rate, it is early. But we're</p> <p>5 going to go ahead and take our recess now so we</p> <p>6 can get the court reporters sorted. Then we</p> <p>7 will come back and hear from Program Suppliers</p> <p>8 and take rebuttal. It is not necessary that</p> <p>9 you use all of your reserved rebuttal time, but</p> <p>10 it is there.</p> <p>11 MR. STEWART: Your Honor, in light of</p> <p>12 Mr. MacLean having gone over his argument time</p> <p>13 by eight minutes, we are going to ask for</p> <p>14 additional time to respond because he we would</p> <p>15 like to have additional time to rebut or 15</p> <p>16 minutes -- 16 actually.</p> <p>17 JUDGE BARNETT: You have 16. See what</p> <p>18 you can do with it. Mr. McLean's transgression</p> <p>19 I think was Judge-created. But we will see how</p> <p>20 it goes.</p> <p>21 JUDGE STRICKLER: There is a lot of</p> <p>22 that going on.</p> <p>23 (A recess was taken at 1:38 p.m.,</p> <p>24 after which the trial resumed at 1:47 p.m.)</p> <p>25 JUDGE BARNETT: Please be seated.</p>	<p style="text-align: right;">4526</p> <p>1 listening to all of the different views on</p> <p>2 viewing, and I will try to -- in the course of</p> <p>3 my presentation, try to address as many these</p> <p>4 issues as I can.</p> <p>5 I think it's a line from Invictus that</p> <p>6 said something to the effect of my head is</p> <p>7 bloody but unbowed. And that's sort of how I</p> <p>8 feel when both Mr. Stewart and Mr. Garrett talk</p> <p>9 about viewing and Dr. Gray's work, and</p> <p>10 hopefully I'll get to address some of those</p> <p>11 also.</p> <p>12 I won't spend time talking about who</p> <p>13 we are and the Claimants that we represent. I</p> <p>14 think Ms. Jane Saunders' testimony covers all</p> <p>15 of that, but it is worth noting that under our</p> <p>16 umbrella of rightsholders, you will find not</p> <p>17 only, you know, Claimants like Viacom and</p> <p>18 Disney and NBC Universal; you will also find</p> <p>19 our syndicated Claimants that represent the</p> <p>20 National Basketball Association, Major League</p> <p>21 Baseball, National Hockey League, and I believe</p> <p>22 the NFL also. Our claim also includes</p> <p>23 Commercial Television station-produced programs</p> <p>24 that are considered part of the -- they are in</p> <p>25 the Program Suppliers' definition.</p>
<p style="text-align: right;">4525</p> <p>1 Good afternoon, Mr. Olaniran.</p> <p>2 MR. OLANIRAN: Good afternoon, Your</p> <p>3 Honor. My name is Greg Olaniran, for the</p> <p>4 record. It's very interesting coming in so,</p> <p>5 the last speaker.</p> <p>6 JUDGE BARNETT: I didn't ask. Are you</p> <p>7 hoping to reserve any time for rebuttal?</p> <p>8 MR. OLANIRAN: I believe ten minutes.</p> <p>9 JUDGE BARNETT: Okay.</p> <p>10 MR. OLANIRAN: If any. Being the last</p> <p>11 is also a disadvantage, to be the last.</p> <p>12 MR. LAANE: Your Honor, I'm not sure</p> <p>13 there's any real distinction because the way we</p> <p>14 set up the schedule is Program Suppliers is</p> <p>15 going last on their initial closing but first</p> <p>16 on their rebuttal. So it's all sort of the</p> <p>17 same thing.</p> <p>18 JUDGE BARNETT: If that's your</p> <p>19 agreement, I don't think that -- I have trouble</p> <p>20 with that concept, but if that's your</p> <p>21 agreement, that's fine.</p> <p>22 So go ahead, Mr. Olaniran.</p> <p>23 CLOSING ARGUMENT BY COUNSEL FOR PROGRAM SUPPLIERS</p> <p>24 MR. OLANIRAN: Thank you, Your Honor.</p> <p>25 I was saying it's very interesting just</p>	<p style="text-align: right;">4527</p> <p>1 So we speak for hundreds of copyright</p> <p>2 holders and including some of our adversaries,</p> <p>3 to some extent.</p> <p>4 The parties agree that the standard</p> <p>5 for allocating royalties is the relative</p> <p>6 marketplace value. And Program Suppliers have</p> <p>7 always understood that their marketplace as a</p> <p>8 hypothetical one where the contemplated</p> <p>9 transactions, the buying and selling of</p> <p>10 distantly retransmitted non-network programs;</p> <p>11 occur absent the compulsory license, Section</p> <p>12 111.</p> <p>13 The relative marketplace standard</p> <p>14 sounds simple enough, but as you can tell, with</p> <p>15 five different methodological approaches to</p> <p>16 their standard, it may not be so simple at all.</p> <p>17 And if you recall, in my opening</p> <p>18 statement in what seems like decades ago, I</p> <p>19 urged you to evaluate these different</p> <p>20 approaches to determine whether they constitute</p> <p>21 evidence of relative market value standard.</p> <p>22 I urge you to consider whether each</p> <p>23 approach purporting to represent relative</p> <p>24 marketplace value would be merely theoretical</p> <p>25 or abstract as opposed to practical and</p>

<p style="text-align: right;">4528</p> <p>1 applicable to the hypothetical market. In 2 other words, I -- I urge you to ask the 3 question how would evidence purporting to 4 follow that standard stack up against evidence 5 of how the market would operate absent the 6 compulsory license? 7 And we believe, Program Suppliers 8 believe, that the evidence that best answers 9 that question is Program Suppliers' viewing 10 methodology. We ask you to find that viewing 11 methodology most directly and most persuasively 12 encapsulates the relative marketplace value 13 standard. 14 I plan to present our arguments in the 15 following order, time permitting. Discuss the 16 legal lens through which we believe that the 17 Judges should evaluate the competing 18 methodological approaches, discuss the record 19 evidence with respect to the hypothetical 20 marketplace, discuss our view and evidence 21 presented in this case and why that evidence 22 best fits the hypothetical market, discuss 23 survey evidence and the -- and the argument 24 against survey evidence as evidence of market 25 value, and finally discuss fee-based regression</p>	<p style="text-align: right;">4530</p> <p>1 owners under Section 106, in order to broadcast 2 a station on a distant basis, the CSO would 3 need to obtain the licenses from the many 4 copyright owners of the programs aired on that 5 broadcast station. 6 Section 111 was enacted in significant 7 part to avoid the transaction costs that would 8 be associated with the licenses needed by the 9 CSOs to publicly perform the works of copyright 10 owners, of programs that are on the stations. 11 Section 111 is a limitation of 12 Section 106 exclusive rights of the copyright 13 owner in that the copyright owner of the 14 program does not grant the CSO the license to 15 publicly perform its work. Instead, it is the 16 statutory license that accords the CSO the 17 privilege of public performance of the 18 copyright owner's programs embedded in the 19 distantly retransmitted station. 20 The fees at issue here are 21 compensation for exploitation of the copyright 22 owners' work. Understanding that relationship 23 between the Section 106 and 111 bears directly 24 on the relative marketplace value standard. 25 In evaluating the different</p>
<p style="text-align: right;">4529</p> <p>1 presented by Drs. Israel and Dr. Crawford and 2 their inherent flaws that make them unreliable 3 evidence of market value. 4 I -- I want to start with the 5 discussion of the law, and I start with Section 6 106. Section 106 of the Copyright Act vests 7 the copyright owner with certain exclusive 8 rights. For copyright owners of motion 9 pictures and other audiovisual works, the 10 exclusive rights include the right to perform 11 their protected works publicly. It's the right 12 of public performance. 13 The language of Section 106 which 14 references motion pictures and audiovisual 15 works means that movies and other programs at 16 issue in this case fall within those 17 definitions and enjoy the protection of 18 Section 106. 19 If CSOs' distant retransmission of a 20 broadcast signal contains these protected 21 works, it's considered public performance of 22 the programs. Because of the rights granted -- 23 I'm sorry, it's considered public performance 24 of the programs. Because of the works -- 25 because of the rights granted, the copyright</p>	<p style="text-align: right;">4531</p> <p>1 methodological approaches that are presented 2 here, we must keep in mind that the fees at 3 issue here are compensation for exploitation of 4 the copyright owners' works, work or works. In 5 this case, those works are the programs that 6 are carried in the signals, the programs embed 7 the in the signals carried by the CSO. 8 We should also keep in mind that the 9 Section 106 -- that Sections 106 and 111 do not 10 grant exclusive rights to program bundles, 11 whether those bundles are in the form of 12 program categories agreed upon by the parties 13 here, whether those bundles are in the form of 14 bundles used to present the results of certain 15 methodologies presented in this proceeding, or 16 whether those bundles are in the form of 17 television channels as is the case, for 18 example, with Canadian and Public Television. 19 It is the works that are embedded on 20 those distant signals that are entitled to 21 compensation through this allocation 22 proceeding. And the fact that the works are 23 presented in some organized form for the 24 benefit of this administrative endeavor does 25 not remove that fact or the applicability of</p>

<p style="text-align: right;">4532</p> <p>1 the law.</p> <p>2 JUDGE STRICKLER: You're saying it's</p> <p>3 okay to have these categories, which are sort</p> <p>4 of the antithesis of having each program</p> <p>5 being -- receiving value in and of itself as we</p> <p>6 do in a distribution proceeding?</p> <p>7 MR. OLANIRAN: That's correct. But</p> <p>8 the parties are organized in a way that makes</p> <p>9 it convenient to make this cases, but that does</p> <p>10 not remove the fact that it's the work that's</p> <p>11 being compensated.</p> <p>12 JUDGE STRICKLER: But we -- but here</p> <p>13 we compensate based on bundles of works,</p> <p>14 bundles, bundled into program categories. So</p> <p>15 you're saying bundling is good for the purposes</p> <p>16 of transacting business, if you will, under</p> <p>17 Section 111?</p> <p>18 MR. OLANIRAN: Well, my point is that</p> <p>19 bundling is an administrative convenience.</p> <p>20 Each -- each bundle, I could come in ten years</p> <p>21 from now and reorganize in some other way as</p> <p>22 whatever the market allows me to do, in some</p> <p>23 other way, whatever -- however it's</p> <p>24 administratively convenient. Let's say two</p> <p>25 program categories merge five years from now.</p>	<p style="text-align: right;">4534</p> <p>1 articulated the critical elements of the market</p> <p>2 structure and how the various methodologies fit</p> <p>3 within those market structures.</p> <p>4 We know how the current regulated</p> <p>5 market functions. I think it's on the slide.</p> <p>6 This is carriage by the CSO. There's no</p> <p>7 negotiating for the carriage parts. And the --</p> <p>8 the fees that are paid are paid by the CSOs to</p> <p>9 the Copyright Office.</p> <p>10 And so in that previous slide, the CSO</p> <p>11 pays -- the copyright owner grants the right to</p> <p>12 broadcast or to air the program within a local</p> <p>13 market, and the broadcaster pays some licensing</p> <p>14 fee. They have some sort of arrangement in the</p> <p>15 market for the right to retransmit within the</p> <p>16 local market.</p> <p>17 In the -- in the -- under Section 111,</p> <p>18 the CSO has the right to retransmit all of the</p> <p>19 programs bundled in the channel out of market,</p> <p>20 the CSO pays the Copyright Office, and the</p> <p>21 copyright owner -- this would be considered</p> <p>22 additional exploitation of the copyright</p> <p>23 owner's work, and we come here for a few months</p> <p>24 to try to figure out how the copyright owner</p> <p>25 gets compensated for that additional</p>
<p style="text-align: right;">4533</p> <p>1 And you still have to figure out what to</p> <p>2 compensate the individual copyright owner or</p> <p>3 copyright owners, whether they have one work or</p> <p>4 whether they have 100 works.</p> <p>5 So the bundles themselves have no</p> <p>6 value, are not protected by the law. Their</p> <p>7 works are protected by the law.</p> <p>8 So the point ultimately is that if you</p> <p>9 extend that logic, any methodology that claims</p> <p>10 to -- to claims that are presented relative to</p> <p>11 marketplace value here but does so only as to</p> <p>12 bundles of programming and provides no methods</p> <p>13 for valuing individual programs as falling</p> <p>14 short of the mark.</p> <p>15 And then keeping that understanding in</p> <p>16 mind, I want to now turn to the hypothetical</p> <p>17 market itself. And in our view, this</p> <p>18 proceeding, we think, has provided what we</p> <p>19 think is by far the best articulation of the</p> <p>20 hypothetical market, as compared to, say, the</p> <p>21 last two Phase I proceedings.</p> <p>22 While those proceedings adopted</p> <p>23 relative marketplace value standards and both</p> <p>24 purported to rely on the hypothetical market</p> <p>25 absent Section 111, neither actually</p>	<p style="text-align: right;">4535</p> <p>1 exploitation.</p> <p>2 And it's really critical that we keep</p> <p>3 in mind that it's the copyright owner that's</p> <p>4 being compensated, not groups of programming,</p> <p>5 unless there's groups of protected programming</p> <p>6 owned by the copyright owner. But the fact</p> <p>7 that we are organized as Program Suppliers or</p> <p>8 Joint Sports Claimants is completely irrelevant</p> <p>9 to the compensation scheme. What's most</p> <p>10 important is compensating the copyright owner.</p> <p>11 So this is how the current market</p> <p>12 works. So what are the elements of the</p> <p>13 hypothetical market structure and how would the</p> <p>14 market function? According to the testimonies</p> <p>15 of Drs. Gray and Dr. Crawford and one of the</p> <p>16 few instances that they actually agree, the</p> <p>17 transactions to determine the relative market</p> <p>18 values of the programs would be free market</p> <p>19 transactions which will ensure the copyright</p> <p>20 owners get a stream of income to cover the</p> <p>21 exploitation of their works by CSOs in distant</p> <p>22 markets.</p> <p>23 In terms of the carriage of the -- in</p> <p>24 terms of carriage of distant signals, the</p> <p>25 current form, they both agree that the current</p>

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<p>1 form of carrying signals will continue as it 2 does exist in the current market. However, 3 because Section 111 will not exist, rather than 4 statutorily prescribe royalty fees, there will 5 be a market price for distantly retransmitted 6 programs, which means that there will be no 7 governmental involvement in a negotiation 8 between the buyers and the sellers of 9 programming. The players in the transactions, 10 rather than the Judges, will make their own 11 financial arrangements. Also, the buyers would 12 have no compulsion to buy and the sellers would 13 have no compulsion to sell. But both would 14 have reasonable knowledge of relevant facts.</p> <p>15 Now, Drs. Gray, Dr. Crawford, 16 Dr. Erdem also agree as to how the market will 17 function. The hypothetical market, they agree, 18 would consist of two markets, a primary market 19 and a secondary market. In the primary market, 20 the broadcaster would negotiate with the 21 copyright owner for dual rights. The first 22 right would be the right that it has under 23 Section 111 to carry -- to air -- for the 24 broadcaster, to air the programming locally. 25 The second right would be the right</p>	<p>1 the television channel.</p> <p>2 JUDGE BARNETT: So in your 3 hypothetical market, the CSO still has to buy 4 the complete signal of each broadcaster; they 5 can't pick program by program?</p> <p>6 MR. OLANIRAN: That's -- that's 7 correct. And I think that's sort of the 8 predominant thinking on the economists that 9 actually commented on it.</p> <p>10 And one way to think about it is how a 11 CSO -- what would a CSO do with an individual 12 program unless maybe the CSO is building a 13 station or network of some sort, in which case 14 they can go direct to the copyright owner. But 15 for broadcast stations, but for retransmission 16 of broadcast stations, which is sort of the 17 realm that we're in, unless the CSO is actually 18 building or creating its own broadcast station, 19 there will be no need, I think -- there will be 20 no need for the CSO to buy direct from the 21 copyright owner.</p> <p>22 And I think the same efficiencies that 23 created Section 111 to some extent probably 24 would still -- would -- would sort of dominate 25 whether or not a CSO would go buy programs</p>
4537	4539
<p>1 that the copyright owner would grant the 2 broadcaster -- the copyright owner would grant 3 the broadcaster the right to grant 4 retransmission rights. I hope that's not too 5 confusing.</p> <p>6 So the broadcaster acquires dual 7 rights from the copyright owner in that primary 8 market. In the secondary market, the CSO would 9 negotiate with the broadcaster to acquire the 10 right to distant retransmission of the 11 broadcaster's signal, which --</p> <p>12 JUDGE STRICKLER: Can we see the slide 13 just before that for a second?</p> <p>14 MR. OLANIRAN: Sure. Is that the one?</p> <p>15 JUDGE STRICKLER: That's the one.</p> <p>16 Okay. Thank you.</p> <p>17 MR. OLANIRAN: So in the secondary 18 market, which I think is the slide we're now 19 looking at, the CSO would negotiate with the 20 broadcaster to acquire the right to distant 21 retransmission of the broadcaster's signal. 22 And if you recall, at this point, the 23 broadcaster now has the rights from the primary 24 market granted by the actual the copyright 25 owner or owners that make up the bundle that is</p>	<p>1 directly.</p> <p>2 And so the -- so with the negotiation 3 between the CSO and the broadcast -- and the 4 broadcaster, it would occur in the secondary 5 market. And so the market value of the right 6 that's granted the broadcaster in the primary 7 market will be determined in that primary 8 market because that needs to be determined in 9 order for the broadcaster to have the right to 10 grant retransmission rights to a CSO or CSOs 11 that wish to retransmit the entire signal.</p> <p>12 And that -- that transaction would be 13 in the form of -- according to Dr. Gray, would 14 be in the form of a surcharge or premium, some 15 sort of two-tier compensation scheme.</p> <p>16 In the secondary market negotiations, 17 the broadcaster would seek to recoup the 18 surcharge or the premium it paid to the 19 individual copyright owners in the primary 20 market through the transaction with the CSO.</p> <p>21 Now, this -- this articulation of the 22 free market is not entirely novel. As a matter 23 of fact, this is what was characterized by the 24 Register in a Section 302 report to Congress as 25 sub-licensing. And I think we cite to that in</p>

<p style="text-align: right;">4540</p> <p>1 our proposed findings. So it's not entirely 2 novel, but it makes sense.</p> <p>3 So given that the value to be 4 determined in the primary market for 5 exploitation of the copyright owner's work, 6 given that that value has to occur, so the 7 question then is what is the most appropriate 8 approach for determining the value in that 9 market when the copyright owner, on whose 10 behalf this scheme that we're in really is set 11 up -- and to some extent the CSOs also, but in 12 terms of the allocation of royalties, it really 13 is in the copyright owner's interest -- so the 14 question is what's the most appropriate 15 methodology that speaks to that -- that -- the 16 copyright owner's interest?</p> <p>17 And it is our view that it is viewing. 18 And why is it viewing? Many witnesses have 19 spoken to why viewing matters, in general and 20 in this particular context.</p> <p>21 The most fundamental reason -- and I 22 think it was Mr. Dove that spoke earlier. The 23 most fundamental reason to accept viewing or to 24 consider viewing is the fact that copyright 25 owners or content creators create content for</p>	<p style="text-align: right;">4542</p> <p>1 just buying and selling ratings. His job, as 2 he described, is to meet with clients, 3 determine what their needs are, and figure out 4 the best way to cull from existing database or 5 databases the information that the client is 6 seeking. And he understands all the various 7 databases. So in our case, he performs custom 8 analysis.</p> <p>9 According to Ms. Hamilton, a witness 10 with several years as a CSO, she testified that 11 viewing mattered in selecting distant signal 12 carriers and that she thought that viewing 13 mattered in selecting distant signal carriers 14 that she thought would best contribute to the 15 subscriber attraction and retention.</p> <p>16 CTV witness, Ms. Burdock, testified 17 that viewing -- that viewing matters to 18 determining what a station would pay to acquire 19 the rights to air a program. That really goes 20 to the primary market transaction.</p> <p>21 It has been mentioned that viewing 22 only matters when there's advertising, so that 23 in the hypothetical market, there would be no 24 advertising, so viewing would not be necessary, 25 but the no advertising -- the -- the -- the</p>
<p style="text-align: right;">4541</p> <p>1 television to be consumed by an audience. If 2 there is no audience, there's no vision part of 3 the television. For that is the purpose.</p> <p>4 So to construct a relative marketplace 5 value of programs without regard to whether 6 people are watching those programs or not is 7 meaningless.</p> <p>8 Mr. Lindstrom, who is an expert in 9 market research and with particular expertise 10 in custom audience research analysis and who 11 worked at Nielsen for almost 40 years, 12 testified that viewing is the currency of the 13 marketplace. He testified that a broadcasters, 14 CSOs, MSOs, cable networks, other media 15 entities, rely on viewing for several different 16 reasons, not necessarily that have anything -- 17 not necessarily because of advertising.</p> <p>18 And I wanted to speak really 19 quickly -- I know there has been this sort of 20 idea that the viewing that Program Suppliers 21 have presented in this proceeding is not 22 actually viewing as known in the industry, and 23 if anyone that has taken that position probably 24 doesn't understand what Mr. Lindstrom does.</p> <p>25 Mr. Lindstrom is not in the shelf of</p>	<p style="text-align: right;">4543</p> <p>1 notion that advertising would be somehow 2 prohibited absent Section 111 really 3 misunderstands what a hypothetical market would 4 look like.</p> <p>5 Advertising is not allowed in the 6 regulatory context because of the law itself. 7 If the law goes away, then there's no 8 prohibition on advertising and creative 9 businesspeople will figure out a way to -- to 10 use it for that purpose, to use whatever the 11 market allows for that purpose.</p> <p>12 JUDGE STRICKLER: Wasn't there also 13 testimony, though, that even if the 14 hypothetical market did allow for advertising, 15 local advertising replacement, that the sliver 16 of viewing of distantly retransmitted stations 17 is so low that advertising revenue would be 18 sort of a de minimis proposition?</p> <p>19 MR. OLANIRAN: That's true. There was 20 testimony to that effect. But that also -- 21 while it may be true, there was no quantitative 22 -- there was no information to quantify what 23 that would look like. But I would also -- I 24 submit to you that the -- the significance of 25 viewing goes well beyond advertising.</p>

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<p>1 If you look at Mr. Pasquale's</p> <p>2 testimony, he was the one that talked about</p> <p>3 premium cable channels like HBO who studied</p> <p>4 advertising, specifically to predict whether or</p> <p>5 not they're going to lose subscribers.</p> <p>6 And -- and that's very important. So</p> <p>7 here's a premium channel with no -- with no</p> <p>8 commercial advertising within programs that's</p> <p>9 still buying viewing information because that</p> <p>10 viewing information, they can study because it</p> <p>11 goes to whether or not their subscribers are</p> <p>12 going to stay because there's a correlation</p> <p>13 between declining viewing and subscribership.</p> <p>14 On cross-examination, Mr. Trautman</p> <p>15 also talked about how, in his consulting work,</p> <p>16 he relied on viewing data to determine the</p> <p>17 value of programming. Mr. Sanders, an SDC</p> <p>18 witness, said that viewing metrics would be a</p> <p>19 component to determining what programs a CSO</p> <p>20 would select to fill in the slots for each</p> <p>21 selected category of programming.</p> <p>22 Dr. Erdem, another SDC witness,</p> <p>23 admitted to using viewing not only in the</p> <p>24 distribution proceeding, which is I think the</p> <p>25 -- a distribution proceeding, if you will.</p>	<p>1 distant subscribers for that station, the time</p> <p>2 of day the program aired by quarter-hour, and</p> <p>3 the type of program aired. Those are four</p> <p>4 different variables that he used.</p> <p>5 The results of his analysis are</p> <p>6 presented in Table 2 of his testimony. For the</p> <p>7 regression analysis, Dr. Gray relied on four</p> <p>8 major data sources: the Nielsen viewing data,</p> <p>9 CDC's carriage data, the Gracenote programming</p> <p>10 data, and the CRTC logs. Now, there are two,</p> <p>11 maybe three major criticisms that have been</p> <p>12 made in this proceeding of the Nielsen data</p> <p>13 relied on by Dr. Gray. The first was that he</p> <p>14 should not have used the NPM data because the</p> <p>15 NPM database was designed for national, not</p> <p>16 local, viewing.</p> <p>17 But none of the critics have</p> <p>18 Mr. Lindstrom's -- the benefit of</p> <p>19 Mr. Lindstrom's 40 years of experience working</p> <p>20 with clients on custom analysis.</p> <p>21 Ms. Shagrin, who testified against the</p> <p>22 use of NPM, left Nielsen almost 20 years ago.</p> <p>23 Moreover, it was Mr. Nielsen who met with MPAA,</p> <p>24 understood what MPAA wished to do, wished to</p> <p>25 construct with regard to viewing, and</p>
4545	4547
<p>1 So there's no question that viewing is</p> <p>2 important and critical, at least in our view,</p> <p>3 to value of a program.</p> <p>4 So now let's talk about Program</p> <p>5 Suppliers' methodology. Dr. Gray presented a</p> <p>6 regression analysis, which predicted the value</p> <p>7 of each quarter-hour of programming on each</p> <p>8 station in a random sample of stations he</p> <p>9 selected for each year, with the exception of</p> <p>10 WGNA.</p> <p>11 It's really misleading to characterize</p> <p>12 Dr. Gray's work as just viewing, as if he just</p> <p>13 took a bunch of minutes, added them up,</p> <p>14 organized them into various program categories,</p> <p>15 and got these results. It really is</p> <p>16 misleading.</p> <p>17 The fact that it's a multiple</p> <p>18 regression analysis which employs multiple</p> <p>19 variables, which in his view would have been an</p> <p>20 indication of -- an indicia of market value in</p> <p>21 a hypothetical market. For each year from 2010</p> <p>22 to 2013, Dr. Gray's regression calculated a</p> <p>23 mathematical relationship between distant</p> <p>24 viewing for a program and the measure of local</p> <p>25 viewing for the program, the total number of</p>	<p>1 recommended the database.</p> <p>2 JUDGE FEDER: I think you meant</p> <p>3 Mr. Lindstrom, not Mr. Nielsen.</p> <p>4 MR. OLANIRAN: He might have met with</p> <p>5 Mr. Nielsen.</p> <p>6 JUDGE STRICKLER: I think when he rips</p> <p>7 off the mask.</p> <p>8 (Laughter.)</p> <p>9 MR. OLANIRAN: Mr. Lindstrom also</p> <p>10 testified that the NPM is appropriate, even if</p> <p>11 you view the NPM as a national database. And</p> <p>12 it is appropriate because it is by far the best</p> <p>13 methodology, the best technology, the best</p> <p>14 method, the most consistent data collection</p> <p>15 process for measuring TV usage.</p> <p>16 And he also did testify that there is</p> <p>17 some overlap between -- there are LPMs, local</p> <p>18 people meters, that actually contribute to the</p> <p>19 data that's published for NPMs. He also said</p> <p>20 that the NPM database is based upon viewing</p> <p>21 that's built up from very localized levels, but</p> <p>22 it's -- and he was emphatic that it's the</p> <p>23 aggregation that's most important.</p> <p>24 And his view was that if you believe</p> <p>25 -- if you believe in sampling, you also have to</p>

<p style="text-align: right;">4548</p> <p>1 believe in the NPM database that the NPM 2 database is a good measure of viewing. That 3 was Mr. Lindstrom's testimony. 4 Because Ms. Shagrin left Nielsen 5 almost 20 years ago, I think it's reasonable to 6 infer that she may not necessarily have been 7 familiar with some of the technological 8 advancements or methodological changes that 9 happened that improved the NPM data and 10 improved the application of the NPM data. 11 I also want to note that although 12 Mr. Nielsen -- Mr. Lindstrom is no longer at 13 Nielsen, but he did say that he was -- he did 14 mention that he was appearing on behalf of 15 Nielsen and that he was appearing with the full 16 support of Nielsen, even though he no longer 17 works there. 18 So the second criticism is the data 19 itself, is about the data that Dr. Gray used 20 itself. And the criticism that there were a 21 lot of zero cells. And some of the witnesses 22 didn't quite grasp what zero cells meant. And 23 there was this sort of hullabaloo about the 24 fact that there were a lot of zeros. 25 But distant signal viewing, in</p>	<p style="text-align: right;">4550</p> <p>1 unreliable. The data that represents the input 2 into the regression model is data that concerns 3 all of the stations in Dr. Gray -- that are -- 4 it's data that is supported by all of the 5 stations -- I'm sorry, let me rephrase that. 6 The data used -- the viewing used in Dr. Gray's 7 model is the data for all of the non-WGNA 8 stations in each of Dr. Gray's sample. 9 So to the extent that we're talking 10 about that data, that data is reliable. 11 Now, I know that Mr. Garrett referred 12 to some comparisons, excuse me, with regard to 13 Program Suppliers' compensable programming on 14 WGNA and so on and so forth. However, that 15 isolates the activity on WGNA with regard to 16 comparisons between Program Suppliers and JSC 17 and perhaps some of the other Claimants. 18 What it doesn't do is put that 19 comparison in the context of total distant 20 viewing or total distant -- or of viewing of -- 21 total distant viewing of compensable programs. 22 There's a reason for that, that -- why that 23 effect of the absence of WGNA is not 24 quantified. 25 As Mr. Lindstrom said in his</p>
<p style="text-align: right;">4549</p> <p>1 general, I mean, both Dr. Gray and Mr. 2 Lindstrom testify to this, is not a lot of 3 viewing. And so the data, you would expect, 4 would be sparse. And, in fact, Mr. Lindstrom 5 said that, you know, this is not unusual at 6 all, that you would have, you know, a small 7 audience of distant viewing. It's to be 8 expected. 9 And it's the sparse nature of distant 10 viewing data that necessitated the regression 11 analysis in the first place. If we had all the 12 data, then we wouldn't need to make predictions 13 about who would view and who wouldn't view. 14 That's the purpose of the regression analysis. 15 And what -- and what ended up 16 happening is that with the regression analysis, 17 you actually wind up with a more robust 18 analysis of viewing than perhaps you would have 19 without one or by simply using the limited 20 number of data that was available from this. 21 So the -- the biggest, perhaps, 22 criticism specific to this proceeding is the 23 absence of WGNA distant viewing data. And our 24 response to that is that -- and the argument 25 goes that the data is wrong and therefore</p>	<p style="text-align: right;">4551</p> <p>1 testimony, he said that programs on WGNA during 2 2010 through 2013, the programs were very 3 small. Dr. Gray, I think, said there was 4 dramatic decline in compensable programming on 5 WGNA over time, such that it has become 6 increasingly less and less important. 7 And let's be clear, the frequent 8 carriage of WGNA -- I think it was Mr. Trautman 9 when I cross-examined him about that, about 10 whether or not there's some legacy carriage 11 associated with different events of the 12 carriage of WGNA, he said there could be. 13 And, again -- and the fees, the 14 royalty fees associated with WGNA, we believe 15 is the relic of the compulsory licensing scheme 16 because given the size of -- the size of 17 compensable programming on WGNA as observed by 18 Mr. Lindstrom and Dr. Gray over a period of 19 time, it would be unreasonable to expect that 20 there would be a material impact of some sort 21 because WGNA is somehow not part of the total 22 pool of stations in the sample -- WGNA viewing 23 is not part of that. 24 I also should mention that reliance on 25 Dr. Gray's work, however you choose to rely on</p>

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<p>1 it, given I think he said -- he said that the 2 results that he presents are within his own 3 zone of reasonableness, we do reference this in 4 our brief, that it's not arbitrary for 5 decision-makers to rely on and accord weight to 6 uncorrected Nielsen data in their 7 determinations, especially when Nielsen numbers 8 are used as reference points for determining 9 allocation of awards in connection with other 10 evidence. 11 You will find that reference in -- I 12 think it's National Association of 13 Broadcasters, 146 F.3d 907, and the pinpoint 14 cite is 931 through -- 931 to 932. And that 15 was the appeal of the 1990-'92 Phase I 16 allocation. 17 And that was the case where NAB argued 18 that uncorrected -- that the CARP could not 19 rely on uncorrected Nielsen data. And if you 20 find your way to that report, you'll see 21 familiar names, Mr. Stewart, Mr. Garrett, 22 Mr. Satterfield, and Mr. Cosentino. 23 So this argument is not entirely 24 meaningless. This will not be the first time 25 that the decision-makers would actually look at</p>	<p>1 I am pressed on time, so I'm going to 2 do it really quickly. I want to talk very 3 quickly -- I won't spend a lot of time on 4 Mr. Horowitz's testimony, only because to some 5 extent, the criticism -- I want to spend time 6 talking about Bortz a little bit, but from our 7 view, the -- the high mark with regard to 8 Mr. Horowitz's testimony and his methodologies 9 is that we think it is better done than Bortz 10 survey. We think that creating the other 11 sports category, enhancing the program 12 definition with examples, customizing the 13 questionnaire to focus only on signals carried 14 by respondents' system, reminding the 15 respondents not to assign any value to 16 substituted programming, and having the ability 17 to compare the Horowitz and Bortz. 18 Now, having the ability to make 19 comparison between the Horowitz and Bortz 20 surveys also allowed us to understand even 21 better the challenges in general with surveys 22 and specifically with the Bortz survey. 23 It also allowed us to determine the 24 extent to which live team sports programming 25 was overvalued under the Bortz survey, and to</p>
4553	4555
<p>1 Nielsen data that parties argued is incorrect 2 and unreliable. 3 But -- so at the -- even with all of 4 this criticism about the data, about whether or 5 not the data is complete or not, we still 6 argue -- we contend that Dr. Gray's analysis is 7 very robust. He sampled approximately 150 8 stations per year. He used 17.4 million 9 observations of quarter-hours of compensable 10 programming for that four-year period. And 11 that's about 4 million observations of the 12 premium periods per royalty year. 13 So when you combine the non-recorded, 14 the so-called zero cells, with the recorded 15 viewing together, you had data from Nielsen for 16 approximately, accepting, which I think most 17 econometricians do, accepting that the zero 18 cell actually constitutes data, non-recorded 19 viewing constitutes data, so you have data for 20 about 70 to 80 percent of the quarter-hours 21 Dr. Gray was analyzing and for each year 22 predicted distant viewing by cable subscriber 23 households of TV stations for each quarter-hour 24 of the day for seven days of the week and 365 25 days per year for each year from 2010 to 2013.</p>	<p>1 the extent that it absorbs a portion of the 2 other sports, which is otherwise in there for 3 the benefit of Program Suppliers. Also to the 4 extent Bortz results undervalue the Program 5 Suppliers category because of its failure to 6 not -- to exclude other sports. 7 Now, just I want to speed this up a 8 little bit and talk about some of our problems. 9 I think we completely, completely and 10 wholeheartedly, support some of the criticisms 11 that were raised by Public Television Claimants 12 insofar -- not for PTV specific ones but the 13 ones that are in general are the problems with 14 Bortz, but I want to mention a couple others 15 before my time is up. 16 Our view is that Bortz does not 17 represent evidence of marketplace value for a 18 host of different reasons. We have agreement 19 with two witnesses that told us what the market 20 -- what the market would look like, although 21 they disagree on how they would construct the 22 value. But we do have some sense, a better 23 sense than I think was discussed in the 24 determinations in '8 and '99 and 2004, of what 25 the market would look like.</p>

<p style="text-align: right;">4556</p> <p>1 It is clear, though, that as far as 2 this record is concerned, the Joint Sports 3 Claimants, all Bortz, have not articulated 4 precisely how the Bortz survey would work in a 5 hypothetical market. 6 And to start with, Joint Sports 7 Claimants have -- there are several problems 8 with Bortz, and I think I list some of them, 9 some of them on the slide; the failure to 10 articulate a market, the lack of validity, as 11 expressed by Dr. Steckel, lack of reliability, 12 by Dr. Stec, the recall bias which came out in 13 my cross-examination of both Dr. Mathiowetz and 14 Dr. -- and Mr. Trautman, the lack of 15 consistency with regard to the language of the 16 questionnaire, measuring only willingness to 17 pay and ignoring the supply side, which with -- 18 Your Honor actually elicited that a few times 19 in the questioning of Mr. Trautman, the fact 20 that it measures an opinion and is not actual 21 opinion. And it fails to specifically 22 reference respondents' knowledge of distant 23 signal programming. 24 All of these are very troublesome with 25 regard to -- with regard to the Bortz survey.</p> <p style="text-align: right;">4557</p> <p>1 And -- however, one of the more critical flaws 2 in the Bortz is that it does not articulate the 3 marketplace. Bortz still lives in this history 4 of just going out, interviewing respondents, 5 telling them what the program categories are, 6 and asking them to figure out a way to make 7 allocations. 8 Well, how does that work in the 9 marketplace? It turns out that although the 10 '98-'99 and '04-'05 decisions presume that 11 Bortz is evidence of marketplace value, on 12 cross-examination with Mr. Trautman and 13 Dr. Mathiowetz, it turns out Bortz 14 representatives don't even understand the 15 market that the respondents are supposed to 16 contemplate when they're responding to the 17 questions. 18 Now I'll give you an example. If we 19 go to slide 13, please. 20 So this is paragraph 3 of the proposed 21 findings that Joint Sports Claimants submitted. 22 And this is the language they have. It says 23 the hypothetical market should be the same 24 marketplace that existed under Section 111, 25 where retransmission licenses are subject to</p>	<p style="text-align: right;">4558</p> <p>1 the same conditions that Section 111 imposed on 2 the CSOs that availed themselves of the 3 license. 4 And then it says the CSO made royalty 5 payments for licenses subject to those 6 conditions, and it is those payments that are 7 being allocated in this proceeding. And then 8 concludes that if the relative value of a 9 program category was X percent, with such 10 conditions in place, and Y under a different 11 set of conditions, the relative market value, 12 and this percent said should be said X percent. 13 This position is confounding, at best. 14 What it does is it says it ignores the 15 long-established relative market value standard 16 for allocating royalties, because clearly this 17 is not advocating relative marketplace value. 18 It presumes, wrongly so, that the 19 relative market value of a program category can 20 be determined under Section 111 regulatory 21 structure. And even worse still, it presumes 22 that whatever some purported value of a program 23 category is determined under the license should 24 be favored over something that's determined 25 under the relative market value standard.</p> <p style="text-align: right;">4559</p> <p>1 So this is just flatly wrong. And 2 then there's Mr. Trautman's testimony that also 3 demonstrated that Bortz is not evidence of 4 marketplace value. Mr. Trautman considered 5 that the Bortz survey is a demand-side survey 6 and a willingness to pay survey. 7 The demand perspective only survey 8 does not constitute a marketplace survey 9 without any evidence of the supply side. 10 Mr. Trautman, who has testified in numerous 11 proceedings, testified that he did not even 12 have a concept of who the seller would be in a 13 hypothetical marketplace. On my 14 cross-examination, he was even confused about 15 the programming market experience respondents 16 should be drawing on in making relative market 17 value allocations. 18 This slide is my exchange with 19 Mr. Trautman when he was on the stand. I asked 20 him: How are you ensuring that the person, 21 meaning the respondent, has not been influenced 22 by the other types of programming that they are 23 carrying that are not on broadcast signals? 24 His first response was: I think they should be 25 influenced by that. I think that their overall</p>
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<p>1 -- I think that their overall as a cable 2 operator, their overall packing decisions and 3 decisions with respect to cable networks and 4 all of that should factor into their 5 consideration of the relative value of the 6 types of programming on these distant signals. 7 So to get some clarity, I asked him 8 again. I inquired further: So then the 9 relative value allocations that you're looking 10 at for them should be influenced by programming 11 that are not on broadcast signals; is that what 12 you're saying? 13 And if you recall, he had said they 14 should be influenced in response to my first 15 question. 16 And his response was: No, it should 17 be informed by their knowledge about the value 18 of programming in the marketplace broadly. 19 And then I asked again: You want them 20 to draw from that experience but you don't want 21 them to be influenced by that experience? Is 22 that a fair summary of your testimony? 23 And he says: No, not a fair summary. 24 We want them to be influenced by that 25 experience.</p>	<p>1 respondents had in mind a marketplace where the 2 Section 111 was still in effect. As to 3 Question 3, the section -- the respondents had 4 in mind the Section 111 is not in effect. As 5 to Question 4, she thought the respondents 6 would have in mind that Section 111 was still 7 in effect. So there are two different 8 conclusions from three different questions in 9 the Bortz survey. 10 So the credit that the prior 11 decision-makers had been giving Bortz with 12 respect to the market that presumed the Bortz 13 represented was not deserved at all. 14 With regard to construct validity, I 15 know that Dr. -- Dr. Steckel gave an extensive 16 explanation of why it was very difficult for 17 respondents to answer the questions that they 18 have been asked to do. If you go to the second 19 one, the second slide. Thank you. 20 And why Bortz survey lacks construct 21 validity. And the problem is what the 22 respondents have been asked to do, one, it's 23 complex. Two, it's not what they do every day. 24 And what you're looking at in this slide is a 25 CSO that has four different -- four different</p>
4561	4563
<p>1 And the exchange goes on. Clearly, 2 even Mr. Trautman was not really clear, not 3 just about what market but the understanding of 4 what the respondents are responding to, what 5 market they should be thinking about, whether 6 it's just a distant signal market or the broad 7 programming experience at large, which would be 8 troublesome because making comparisons between 9 -- making allocations with respect to value of 10 programming on distant broadcast stations using 11 broad programming experience for, say, ESPN or 12 TBS or some of the cable -- some of the other 13 cable networks is very misleading because it's 14 very different business models. 15 And then there was Dr. Mathiowetz. I 16 asked her the same questions. Dr. Mathiowetz 17 was also inconsistent with regard to what 18 marketplace the respondents had in time -- had 19 in their mind in responding to the Bortz survey 20 questions. And I think for Question 2b, the 21 ranking question, she said that the -- she said 22 that the respondents had a marketplace -- this 23 is -- Dr. Mathiowetz is the one that stamps 24 Bortz survey responses valid and reliable. 25 She said, that's the Question 2b, the</p>	<p>1 signals, carrying four different signals, 2 assuming that the CSO -- each signal has about 3 ten, which actually on a regular station you 4 have several more programming. And the CSO has 5 been asked to -- to take the programming -- I 6 mean, the CSO has been asked to take the 7 programming on each of the signals and then map 8 it into some other type of program category 9 that we're using in this proceeding. 10 And the -- and they do it on average 11 in about ten -- I think it was ten minutes, 12 Mr. Trautman testified. It's a very complex 13 exercise to do on the phone within such a short 14 period of time. And I think Dr. Steckel was 15 very articulate on this problem. 16 And then there was also Dr. Stec. 17 Dr. Stec performed two exercises. The first 18 one was looking at the response of CSOs across 19 the board, Bortz respondents across four years, 20 and he determined that it was inconsistent. 21 And then he determined that those 22 responses were inconsistent and ran three 23 different statistics; the correlation 24 coefficient, the R squared, and the offer, 25 which -- which supported his conclusion that</p>

<p style="text-align: right;">4564</p> <p>1 the Bortz respondents' -- responses were 2 inconsistent across the four years. 3 He also then took the CSOs that both 4 Horowitz and Bortz had in common and ran the 5 same tests and determined that comparing the 6 results for those -- of those CSOs, that the 7 results -- the results were, again, 8 inconsistent. 9 Quickly, with regard to the recall 10 bias, the 2010 survey, the Bortz survey was not 11 completed until 2013. It took about -- it's a 12 14-month lag to when the year ended and when 13 the respondents were being asked to respond to 14 questions. 15 The 2011, a portion of it, about 16 25 percent, was done in 20 -- I'm sorry, the 17 2010 was not completed until 2012, and then the 18 2011 was not completed until 2013. 19 So those are the highlights of it. 20 With regard to -- I wanted to talk to you 21 really quickly about this argument about 22 Dr. Gray's reformulation of Dr. Crawford's 23 results. And what Dr. Gray did was, to the 24 extent there's an argument that exists that 25 CSOs make economic choices under the -- under</p>	<p style="text-align: right;">4566</p> <p>1 whether it's subscribership or viewership or 2 something else, they're not just picking them 3 out of a hat? 4 MR. OLANIRAN: Well, but they -- since 5 they have to pay the minimum fee anyway, it's 6 very difficult to discern anything from that 7 conduct. 8 JUDGE STRICKLER: Well, it's like -- 9 it turns it like into a public good. I can go 10 to the park and I don't have to pay for the 11 park but I could pick among the parks I want to 12 go to. They are all free, but I would rank one 13 over the other. If I'm New York City, I can go 14 to Central Park and it's not going to cost me 15 anything; I could choose to go to Prospect 16 Park. I can go any place I want even though 17 it's free, but I'm ranking them based on my 18 preferences. Why aren't the CSOs doing that in 19 the same way in selecting stations because the 20 mere fact that they're not paying for them 21 doesn't mean that they don't have a rank value? 22 MR. OLANIRAN: But the distinguishing 23 factor, though, among the minimum fee CSOs and 24 the CSOs that are paying more than the minimum 25 fee is the fact that they are paying more than</p>
<p style="text-align: right;">4565</p> <p>1 the Section 111 license, you have to accept the 2 -- even if you don't agree with how Dr. Gray 3 did it, the point is still critical. 4 And the point is that you can't -- the 5 statutory minimum fees are going to be paid by 6 CSOs anyway. To the extent -- even though 7 Dr. Gray agrees with the regression analysis 8 because it's based on -- it's based on 9 regulatorily prescribed fees, if you are 10 looking to determine whether or not you can 11 glean anything from the conduct of a CSO, then 12 you look at the CSOs that actually paid what 13 they didn't have to pay, paid beyond the 14 minimum fee, and look at the mix of programming 15 that those CSOs carry. 16 That, to the extent that you agree 17 that there's an argument, then it makes -- then 18 that's how it makes sense. 19 JUDGE STRICKLER: So don't you think, 20 though, that the decisions that are made even 21 by those CSOs that have to pay the minimum fee 22 may still have to -- if we assume they're being 23 at all rational, that they're ranking the 24 program types or the stations themselves based 25 upon whether or not they'll maximize some goal,</p>	<p style="text-align: right;">4567</p> <p>1 they have to pay. 2 JUDGE STRICKLER: Well, you may get 3 more information because they have to pay, but 4 you're not getting no information when they 5 were going to pay the minimum fee anyway, 6 because they still have to make a decision as 7 to which stations they want to transmit. So 8 there may still be information in terms of 9 ranking like you would for any -- if you're 10 going to use any particular good, even if 11 you're not paying for it, if it excludes 12 another good, you have to rank one versus the 13 other and you're getting a sense of relative 14 value, aren't you? 15 MR. OLANIRAN: I think you're correct 16 on that point. However, again, we -- to the 17 extent you can glean anything from fees-based 18 regression, if there's an argument that while 19 -- you know, they're making economic choices, 20 if everyone paid minimum fee, they are equally 21 situated. However if you study, it's striking 22 that the CSOs that pay more than the minimum 23 are the ones -- and if you look at the 24 programming mix that they carry, it is a 25 striking difference from -- and I get your</p>

4568	4570
<p>1 point.</p> <p>2 JUDGE STRICKLER: And I understand</p> <p>3 your point too. But here's a problem that has</p> <p>4 been bothering me about that. Maybe you can</p> <p>5 help me out.</p> <p>6 If you only have one DSE, so you have</p> <p>7 a minimum fee, and you want to get the station</p> <p>8 with the best mix that you think is optimal for</p> <p>9 you, even though, you know, you were going to</p> <p>10 pay anyway, so you're still rational, so say</p> <p>11 you think, well, something heavily weighted to</p> <p>12 sports, for example, would be the best</p> <p>13 station --</p> <p>14 MR. OLANIRAN: Or movies, by the way.</p> <p>15 (Laughter.)</p> <p>16 JUDGE STRICKLER: Well, if we quibble,</p> <p>17 I'll get confused. So let's stick with sports.</p> <p>18 So it's sports, and then say a station then has</p> <p>19 a second DSE and actually now has to pay extra</p> <p>20 and makes a choice. So now we'll take movies,</p> <p>21 okay?</p> <p>22 So they say, well, now, you have --</p> <p>23 and I am following Dr. Gray's analysis where he</p> <p>24 carves out the minimum fees, now you see</p> <p>25 top-loaded with regard to movies and Program</p>	<p>1 you're paying a mandatory minimum fee, you're</p> <p>2 still going to rank -- if you assume</p> <p>3 rationality, you're still going to rank the</p> <p>4 stations based on those that provide you with</p> <p>5 the best, the optimum program mix for purposes</p> <p>6 of meeting some economic goal, retaining</p> <p>7 subscribers, viewership, whatever the goal</p> <p>8 happens to be. So if you ignore those and then</p> <p>9 go to the -- to those that are only paying more</p> <p>10 than the minimum fee, you're leaving out a lot</p> <p>11 of information that -- in terms of ranking</p> <p>12 value, aren't you?</p> <p>13 MR. OLANIRAN: I think that's a fair</p> <p>14 point. But it is striking the difference</p> <p>15 between when you -- when you correct, when you</p> <p>16 correct Dr. Crawford's and only look at systems</p> <p>17 that actually -- that made choices to pay more</p> <p>18 than what's -- what they're required to pay.</p> <p>19 And I accept as a fair point the fact</p> <p>20 that you may lose -- you may lose the ranking</p> <p>21 order, the order of importance, the order of</p> <p>22 value by the higher -- the rationale that</p> <p>23 constitutes a basis for -- for carriage.</p> <p>24 JUDGE STRICKLER: And your point may</p> <p>25 be, and correct me if I'm mischaracterizing it,</p>
4569	4571
<p>1 Suppliers' category and other categories as</p> <p>2 well, but they have -- but if you've already</p> <p>3 carved out those stations that -- where it</p> <p>4 would have been accounted for in the minimum</p> <p>5 fee, those were the most valuable ones because</p> <p>6 some rational process was assumed, maybe it</p> <p>7 wasn't rational at all, maybe -- well, it may</p> <p>8 be rational, but it may be legacy carriage, but</p> <p>9 there's a whole bunch of issues that come in.</p> <p>10 But the question is if we only look at</p> <p>11 the second DSE, we're eliminating all the</p> <p>12 valuable information about ranking value even</p> <p>13 when you -- it's like a public good; you're</p> <p>14 going to have to pay for it anyway.</p> <p>15 So doesn't that make Dr. Gray's</p> <p>16 minimum fee carveout -- doesn't that obscure</p> <p>17 what the marketplace really looks like?</p> <p>18 MR. OLANIRAN: Well, to the extent you</p> <p>19 deem it a marketplace. I think it's -- I think</p> <p>20 it's --</p> <p>21 JUDGE STRICKLER: Well, relative</p> <p>22 value.</p> <p>23 MR. OLANIRAN: Right.</p> <p>24 JUDGE STRICKLER: It obscures relative</p> <p>25 value because even when you're not -- even when</p>	<p>1 that you get better information if you're</p> <p>2 looking beyond the first DSE and the minimum</p> <p>3 fee because you have to pay in order to</p> <p>4 transmit additional stations, so that's better</p> <p>5 information because you have to pay for the</p> <p>6 privilege of doing so; whereas merely ranking</p> <p>7 them when you were going to pay otherwise,</p> <p>8 maybe you are getting weaker information with</p> <p>9 regard to preference?</p> <p>10 MR. OLANIRAN: That's correct. And</p> <p>11 it's not just better -- it's not just better</p> <p>12 information. The CSOs are actually coming out</p> <p>13 of their pocket to pay, to acquire another</p> <p>14 signal. But if you look at the total mix of</p> <p>15 programming that they're carrying, this is</p> <p>16 actually where I think the answer resides in</p> <p>17 that both in the case of Dr. Israel and in the</p> <p>18 case of Dr. Crawford, the large -- the vast</p> <p>19 majority of the programming mix favors --</p> <p>20 actually favors almost all of the -- all of the</p> <p>21 other Claimants with the exception of JSC, I</p> <p>22 think in both cases. When it was reformulated,</p> <p>23 they get 4 percent in one and another one gets</p> <p>24 zero percent.</p> <p>25 So I don't know if you have any other</p>

<p style="text-align: right;">4572</p> <p>1 questions about that, but I think --</p> <p>2 JUDGE STRICKLER: No.</p> <p>3 MR. OLANIRAN: -- I'm being told that</p> <p>4 my time is up.</p> <p>5 JUDGE BARNETT: Yes, it is.</p> <p>6 MR. OLANIRAN: If I could just have</p> <p>7 two more minutes just to wrap up if that's</p> <p>8 okay.</p> <p>9 JUDGE BARNETT: That will be your</p> <p>10 rebuttal.</p> <p>11 MR. OLANIRAN: The parties are</p> <p>12 actually prohibiting me --</p> <p>13 JUDGE BARNETT: Okay.</p> <p>14 MR. OLANIRAN: -- from a rebuttal.</p> <p>15 They're banning me from having a rebuttal.</p> <p>16 And so let me conclude with the</p> <p>17 following. I will continue to say this:</p> <p>18 Television was created so that people could</p> <p>19 watch televised programs. Television would be</p> <p>20 dead today if no one had any -- if no one had</p> <p>21 interest in watching.</p> <p>22 Viewing is paramount evidence of what</p> <p>23 attracts and retains subscribers. There isn't</p> <p>24 a single party in here whose clients don't care</p> <p>25 about whether or not their content is being</p>	<p style="text-align: right;">4574</p> <p>1 CARP for 1978, 1979, 1983, 1989, and 1990 to</p> <p>2 '92. So any formulation of the value of</p> <p>3 programming that ignores the audience that</p> <p>4 consumes such programs will be incomplete.</p> <p>5 Program Suppliers believe viewing is</p> <p>6 the most direct and most persuasive evidence of</p> <p>7 the relative market value of distant signal</p> <p>8 programming. We think it's clear that</p> <p>9 fees-based regressions are fundamentally flawed</p> <p>10 as they relied on fees paid by the CSOs under</p> <p>11 the regulatory scheme. Bortz surveys are</p> <p>12 fraught with issues including failure to</p> <p>13 articulate a marketplace.</p> <p>14 However, in the unlikely event that</p> <p>15 the Judges choose to accord weight to a survey</p> <p>16 of CSOs, we believe also that they should -- we</p> <p>17 believe they should allow the Horowitz survey</p> <p>18 presented by Program Suppliers.</p> <p>19 The record in this proceeding supports</p> <p>20 the basic form royalty allocation of Program</p> <p>21 Suppliers within the ratings identified in the</p> <p>22 fourth column of the table that's on the</p> <p>23 screen.</p> <p>24 For 2000-2010, it's 44.2 to 50.9,</p> <p>25 which is the range of the Horowitz survey and</p>
<p style="text-align: right;">4573</p> <p>1 consumed by an audience. That remains the case</p> <p>2 whether the audience is local, distant, regular</p> <p>3 cable network. It doesn't matter.</p> <p>4 As the 1990-'92 CARP stated, it is</p> <p>5 disingenuous to say the cable system is</p> <p>6 interested only in attracting subscribers but</p> <p>7 totally unconcerned with whether or not the</p> <p>8 subscriber, in fact, watches programming.</p> <p>9 And I do understand that they gave</p> <p>10 some weight to Bortz in that proceeding, but</p> <p>11 they accorded Program Suppliers quite a few</p> <p>12 points above the -- their Bortz share in that</p> <p>13 proceeding also.</p> <p>14 So when you -- when you took viewing</p> <p>15 evidence, when you gave viewing evidence a</p> <p>16 fresh look in the 2000-2003 distribution</p> <p>17 proceeding, you said that viewership is the</p> <p>18 initial and predominant heuristic that a</p> <p>19 hypothetical CSO would consider in determining</p> <p>20 whether to require a bundle of programs for</p> <p>21 distant retransmission subject to marginal</p> <p>22 adjustments needed to maximize viewership.</p> <p>23 And the D.C. Circuit agreed with you.</p> <p>24 In fact, your view of viewing, no pun intended,</p> <p>25 was the predominant view of the CRT and the</p>	<p style="text-align: right;">4575</p> <p>1 Dr. Gray's regression results. For 2011, 39.79</p> <p>2 to 49.92. For 2012, 36.17 and 37.13. And for</p> <p>3 2013, for 36.05 to 45.09.</p> <p>4 Once the Judges determine that the</p> <p>5 basic fund award, determine the basic fund</p> <p>6 awards, they should also determine that the</p> <p>7 3.75 Fund awards by adjusting the basic fund</p> <p>8 awards in a manner that accounts for PTV's</p> <p>9 non-participation in the 3.75 Fund.</p> <p>10 Further, in light of the Music</p> <p>11 Claimants' receipt of final distribution from</p> <p>12 the Syndex Fund, Program Suppliers are the only</p> <p>13 other Claimant group participating in the</p> <p>14 Syndex Fund, and therefore should be entitled</p> <p>15 to 100 percent of the remaining Syndex Fund.</p> <p>16 And thank you for accommodating me for</p> <p>17 a couple more minutes. That's all I have.</p> <p>18 JUDGE BARNETT: Thank you,</p> <p>19 Mr. Olaniran.</p> <p>20 Now for rebuttal? Are you going in</p> <p>21 reverse order? That would be -- Mr. MacLean,</p> <p>22 do you have any rebuttal?</p> <p>23 MR. MacLEAN: With your permission,</p> <p>24 Your Honor. And I know I'm already over my</p> <p>25 time. I could just take just a minute to</p>

<p style="text-align: right;">4576</p> <p>1 address a point towards the end.</p> <p>2 JUDGE BARNETT: One minute.</p> <p>3 REBUTTAL ARGUMENT ON BEHALF OF</p> <p>4 SETTLING DEVOTIONAL CLAIMANTS</p> <p>5 MR. MacLEAN: Thank you, Your Honor.</p> <p>6 I want to take one quick minute to address a</p> <p>7 question from Judge Strickler regarding</p> <p>8 Dr. Gray's dropping of the minimum fee systems.</p> <p>9 And I understand your point, Judge</p> <p>10 Strickler, if you carve out -- if you assume</p> <p>11 that the minimum fee systems are choosing first</p> <p>12 the programming they value most, then cutting</p> <p>13 those systems out might remove certain</p> <p>14 information. However, the effect that would</p> <p>15 have on the regression is actually the opposite</p> <p>16 of what you hypothesized. Because it's the</p> <p>17 minimum fee systems that pay the least, they</p> <p>18 would, by your hypothesis, be retransmitting</p> <p>19 the highest number of minutes of programming by</p> <p>20 proportion in terms of what they value. It</p> <p>21 would be the later systems that they add on</p> <p>22 that would actually be positively associated</p> <p>23 with fees paid.</p> <p>24 I also want to point out with respect</p> <p>25 to Dr. Gray dropping the minimum fee systems,</p>	<p style="text-align: right;">4578</p> <p>1 MR. SATTERFIELD: In which case, we</p> <p>2 have nothing.</p> <p>3 JUDGE BARNETT: Okay, thank you.</p> <p>4 How about Public Television?</p> <p>5 Mr. Dove, ten minutes.</p> <p>6 REBUTTAL ARGUMENT OF</p> <p>7 PUBLIC TELEVISION CLAIMANTS</p> <p>8 MR. DOVE: Thank you, Your Honor, Your</p> <p>9 Honors. Just a few points on the regression</p> <p>10 criticisms.</p> <p>11 First, it's important to remember that</p> <p>12 every time Mr. MacLean was talking about the</p> <p>13 word "systems," he was only talking about</p> <p>14 Dr. Israel's regression. Dr. Crawford, as you</p> <p>15 know, only looked at -- or looked at subscriber</p> <p>16 group level variation, which was a new</p> <p>17 innovation that Dr. George testified made his</p> <p>18 regression even more useful and precise and</p> <p>19 addressed a number of the issues raised by</p> <p>20 prior panels.</p> <p>21 The question Mr. MacLean put up on the</p> <p>22 screen shows a fundamental misunderstanding, if</p> <p>23 I understand the question correctly, of the</p> <p>24 regression analysis. He asked: Why would a</p> <p>25 lower fee-paying system or subscriber group</p>
<p style="text-align: right;">4577</p> <p>1 Dr. Crawford effectively does something very</p> <p>2 similar. His regression using fixed effects</p> <p>3 effectively drops out all systems that have</p> <p>4 only a single subscriber group. That's about</p> <p>5 half of all systems in the universe. And</p> <p>6 those, of course, are systematically different</p> <p>7 than other systems because they're the ones</p> <p>8 that are least likely to be -- to be in</p> <p>9 partially local, partially distant areas.</p> <p>10 JUDGE STRICKLER: He dropped out</p> <p>11 44 percent of the systems and 22 percent of the</p> <p>12 subscriber groups or something along those</p> <p>13 lines, right?</p> <p>14 MR. MacLEAN: Your Honor, it's</p> <p>15 something closer to between about 49 and</p> <p>16 51 percent of the systems and approximately</p> <p>17 15 percent of the observations, which would be</p> <p>18 -- which would be the number of subscriber</p> <p>19 groups. My point is that these are</p> <p>20 systematically different than the systems that</p> <p>21 have multiple subscriber groups. Thank you.</p> <p>22 JUDGE BARNETT: Thank you.</p> <p>23 No one answered my question. Are you</p> <p>24 going in reverse order? So that means</p> <p>25 Canadians?</p>	<p style="text-align: right;">4579</p> <p>1 chooses to retransmit more minutes of</p> <p>2 programming that it does not value?</p> <p>3 No one is saying -- as I understand</p> <p>4 it, no one is saying that the systems do not</p> <p>5 value the programming they're carrying more of.</p> <p>6 They do value it. But the systems and</p> <p>7 subscriber groups that are willing and able to</p> <p>8 pay more have a different relative valuation,</p> <p>9 and the regressions attempt to calculate</p> <p>10 average relative valuations across the entire</p> <p>11 country.</p> <p>12 On the minimum fee issue, I just urge</p> <p>13 you to look at page 1424 of the transcript.</p> <p>14 This is part of Dr. Crawford's testimony.</p> <p>15 Dr. Gray simply did the calculations wrong.</p> <p>16 And when Dr. Crawford corrected those</p> <p>17 calculations, he got basically the same results</p> <p>18 as in his own analyses.</p> <p>19 With regard to the various other</p> <p>20 criticisms, Your Honor, that have been made of</p> <p>21 the regression analyses, we would just ask that</p> <p>22 you -- would refer you to our proposed</p> <p>23 findings, pages 12 to 18 of our proposed</p> <p>24 findings and pages 7 to 11 of our response</p> <p>25 findings and to the record itself.</p>

<p style="text-align: right;">4580</p> <p>1 Dr. Crawford and the other experts certainly do 2 a much better job of explaining all this than I 3 could ever do.</p> <p>4 Just a couple other rebuttal points on 5 other issues. Public Television is asking for 6 significantly increased share from 2004-'05, 7 and one could reasonably ask, well, you know, 8 other than the quantitative studies, what 9 evidence is there in the record supporting such 10 a large increase?</p> <p>11 And we would submit, Your Honors, that 12 there's lots of evidence. And we -- as we said 13 in our opening, the best of the best has gotten 14 better. Public Television had record ratings 15 in 2010 to '13. Multi-casting allowed for new 16 niche channels of Public Television programming 17 that CSOs valued and decided to carry 18 distantly. Public Television came more 19 distinctive as its look-alike channels moved 20 towards reality programming and away from the 21 type of programming that Public Television 22 carried. Public Television had the best 23 programming in at least six very important 24 niches of programming in 2010 to '13 and 25 constituted the largest volume of compensable</p>	<p style="text-align: right;">4582</p> <p>1 Television increased, what's the -- what's 2 happening behind the scenes to -- to -- that's 3 reflected in Dr. Crawford's regression, that's 4 what I'm trying to do.</p> <p>5 And so in that context, I think 6 looking at ratings is -- would be helpful.</p> <p>7 JUDGE STRICKLER: Some sort of a 8 reality check?</p> <p>9 MR. DOVE: A reality check, I like 10 that term. I'm sure it will be used again here 11 in a moment, but I think that would work in 12 this context, yes, Your Honor.</p> <p>13 JUDGE STRICKLER: Thank you.</p> <p>14 MR. DOVE: Other -- you know, a couple 15 other reasons. Other types of distant signal 16 carriage decreased while Public Television's 17 increased. And then, as we've talked about, 18 the amount of compensable programming on WGNA 19 fell by half. And that's a lot of 20 retransmissions that should no longer be 21 receiving royalties. And that would be 22 reflected in Public Television's increased 23 share.</p> <p>24 Another point that the Joint Sports 25 Claimants have noted in their papers, and they</p>
<p style="text-align: right;">4581</p> <p>1 minutes of any category.</p> <p>2 So we submit it's -- it's ridiculous, 3 really, on its face that the Bortz survey 4 estimated that Public Television's value was 5 approximately the same as the Devotionals, 6 which constitute only one niche, which as 7 Dr. Gray testified is much less viewed than 8 Public Television or any other category of 9 programming.</p> <p>10 JUDGE STRICKLER: Counsel, a moment 11 ago as you were going through your litany of 12 reasons why there should be an increase in the 13 share that goes towards Public Television, one 14 of the items that you mentioned were record 15 ratings. So are you saying that we should rely 16 on ratings as some measure of value in this 17 proceeding?</p> <p>18 MR. DOVE: I think it's helpful. What 19 I'm trying to do with this is just sort of 20 corroborate, you know, we're asking you to rely 21 on the quantitative studies. Obviously, 22 Dr. Crawford's regression is what we're asking 23 you to rely on. But, you know, if one were to 24 ask, well, does that make sense compared to 25 what happened last time around, why has Public</p>	<p style="text-align: right;">4583</p> <p>1 may do so here again in a minute, is that in 2 2004-'05, Public Television supported the use 3 of the Bortz survey as adjusted by Mr. 4 McLaughlin to determine its share even though, 5 you know, many of the same alleged problems 6 with the Bortz survey may have existed then.</p> <p>7 So the question could be, one could 8 ask, well, is there anything really different 9 this time around? And we would -- we would 10 submit that, yes, and as we said earlier this 11 morning, lots of differences. You know, they 12 fall into two categories. One is Bortz got 13 worse, and then the other methods and data got 14 a lot better.</p> <p>15 JUDGE STRICKLER: Counsel became more 16 inquisitive?</p> <p>17 (Laughter.)</p> <p>18 MR. DOVE: And counsel became more 19 inquisitive. And we got some new associates 20 who became even more inquisitive.</p> <p>21 So I won't go through those again, 22 but, you know, we believe that the Bortz survey 23 has gotten worse in a variety of ways that are 24 reflected in our papers and that Dr. Crawford's 25 regression has gotten, you know, remarkably</p>

<p style="text-align: right;">4584</p> <p>1 better.</p> <p>2 Finally, I guess in closing, Your</p> <p>3 Honor, as you may have heard, this year is the</p> <p>4 50th anniversary of Mr. Rogers' Neighborhood on</p> <p>5 Public Television. The first broadcast was on</p> <p>6 February 19th, 1968. And in honor of that</p> <p>7 event, I thought I'd look to see if Mr. Rogers</p> <p>8 himself had ever said anything that would help</p> <p>9 Your Honors in your decision-making here. As</p> <p>10 it turns out, Mr. Rogers had an entirely</p> <p>11 different view, take, on what value means than</p> <p>12 anything that we've heard in these proceedings.</p> <p>13 He told us that "it's not so much what</p> <p>14 we have in this life that matters, it's what we</p> <p>15 do with what we have." So regardless of our</p> <p>16 award in these proceedings, the Public</p> <p>17 Television Claimants are going to continue to</p> <p>18 offer the best of the best programming for</p> <p>19 children and adults in history, drama, science,</p> <p>20 and the arts. We're going to do the best we</p> <p>21 can with what we have.</p> <p>22 And to that end, we respectfully</p> <p>23 request that the Judges award Public Television</p> <p>24 the following shares of the basic fund in</p> <p>25 accordance with Dr. Crawford's initial</p>	<p style="text-align: right;">4586</p> <p>1 REBUTTAL ARGUMENT OF</p> <p>2 COMMERCIAL TELEVISION CLAIMANTS</p> <p>3 MR. STEWART: I want to talk first</p> <p>4 about a few things Mr. Olaniran said.</p> <p>5 First, he made this plea at the end</p> <p>6 about how everybody knows that cable television</p> <p>7 is about viewing programming, programming</p> <p>8 that's to be consumed. But the problem is this</p> <p>9 is another one of those examples of misleading</p> <p>10 shorthands because that does not justify the</p> <p>11 unsubstantiated leap to saying therefore the</p> <p>12 relative value must be measured by how much</p> <p>13 viewing is done.</p> <p>14 We heard from Ms. Burdick that in her</p> <p>15 cable system, they look at the question of</p> <p>16 whether any household -- how many households</p> <p>17 viewed any minute of programming on various</p> <p>18 channels. They ranked their channels based on</p> <p>19 how many households viewed once. They don't</p> <p>20 look at the volume. It's not important.</p> <p>21 And, in fact, this is -- there is</p> <p>22 evidence in the record with regard to the</p> <p>23 degree of advertising. In Exhibit 2005, at</p> <p>24 page 5, note 7, which is Dr. Crawford's</p> <p>25 rebuttal, he presents evidence about the fact</p>
<p style="text-align: right;">4585</p> <p>1 analysis: 17.73 percent for 2010,</p> <p>2 23.17 percent for 2011, 22.3 percent for 2012,</p> <p>3 and 23.49 percent for 2013.</p> <p>4 Thank you for your time, Your Honors,</p> <p>5 and for your courtesies in hearing our case.</p> <p>6 Thank you.</p> <p>7 JUDGE BARNETT: Thank you, Mr. Dove.</p> <p>8 Mr. Stewart? You reserved 15 minutes.</p> <p>9 MR. STEWART: Thank you.</p> <p>10 JUDGE BARNETT: But I think you</p> <p>11 actually saved 16.</p> <p>12 MR. STEWART: Yes. But I'm going to</p> <p>13 try to use fewer than 16. I'm just going in</p> <p>14 reverse order.</p> <p>15 Well, I just want to say that Mr.</p> <p>16 Garrett and I and maybe others in the room have</p> <p>17 the unique experience of cross-examining Mr.</p> <p>18 Rogers in one of these proceedings. It was a</p> <p>19 trip.</p> <p>20 (Laughter.)</p> <p>21 JUDGE BARNETT: I wish I had been</p> <p>22 here.</p> <p>23 MR. GARRETT: You just read my</p> <p>24 response.</p> <p>25 //</p>	<p style="text-align: right;">4587</p> <p>1 that about 94 percent of cable operator</p> <p>2 revenues are for subscriber fees and the rest</p> <p>3 is for advertising.</p> <p>4 Mr. Olaniran --</p> <p>5 JUDGE STRICKLER: Just to clarify, he</p> <p>6 was referring to all cable, not -- not just --</p> <p>7 well obviously, not distantly retransmitted.</p> <p>8 There's no new advertising.</p> <p>9 MR. STEWART: Correct. Cable industry</p> <p>10 in general, all of the cable networks on which</p> <p>11 advertising is permitted.</p> <p>12 Mr. Olaniran took a shot at Ceril</p> <p>13 Shagrin and said she has been out of Nielsen</p> <p>14 for 20 years. But, listen, she was</p> <p>15 instrumental in creating and rolling out the</p> <p>16 NPM's sample itself. She worked at Nielsen for</p> <p>17 27 years, and for the past 20 years, she work</p> <p>18 at Univision and she was responsible for</p> <p>19 overseeing Nielsen. She was active in the</p> <p>20 committee on research excellence and the Media</p> <p>21 Ratings Council. In 2009, she testified before</p> <p>22 Congress and was asked to oversee a committee</p> <p>23 to ensure that the rollout of a new technology</p> <p>24 for Arbitron for measuring viewing or for</p> <p>25 measuring -- actually, that one was radio</p>

<p style="text-align: right;">4588</p> <p>1 ratings was accurate. So she is -- she knew 2 what she was talking about. 3 Next Mr. Olaniran referred you to a 4 Court of Appeals case. This was the 1990 to 5 1992 case, one case, 146 F.3d. If you look 6 there, that was NAB arguing the following: The 7 CARP panel intended to give us a share that was 8 equal to the low end of our viewing, but they 9 failed to make -- to correct the categorization 10 errors that MPAA had made, so our minimum 11 viewing fee should have been -- sorry -- 12 minimum viewing share should have been higher. 13 What the Court of Appeals said was 14 that's not right because the CARP rejected 15 viewing as the basis for making that award and 16 they quoted language, on page 932, in which 17 they referred to the fact that Program 18 Suppliers agreed that viewing does not measure 19 value. 20 Mr. Olaniran talked about data issues 21 with respect to Dr. Gray and tried to minimize 22 the effect of those. But apart from that there 23 were substantial methodological errors made by 24 Dr. Gray, and Dr. Bennett described them in 25 some detail and showed how they resulted in</p>	<p style="text-align: right;">4590</p> <p>1 suggesting that the regression tells you 2 something about systems, not programming. 3 But this is -- this is the reason why 4 Dr. Israel said you can't make bivariate 5 conclusions in a multi-variate context. That's 6 -- what that means is that the -- the 7 regressions themselves had controls. So, in 8 effect, what the regression asked was what is 9 the relative value of Devotional and all the 10 other program categories among subscriber 11 subgroups that are all in the same state, that 12 are all in the same -- in similar situations in 13 terms of size, in terms of local broadcast 14 signals, in terms of location, because of the 15 fixed effects? 16 So -- so there is -- so turning that 17 regression into this simple, simplistic 18 statement that what this is measuring is 19 something that has to do with geographic 20 location or types of markets is simply not 21 correct. 22 Mr. MacLean also showed you that 23 6 percent number for CTV that came out of 24 Dr. Erdem's first manipulation. Dr. Erdem 25 disclaimed the rest of his manipulations after</p>
<p style="text-align: right;">4589</p> <p>1 actual biased results in favor of -- that 2 favored Program Suppliers. 3 The last thing that Mr. Olaniran 4 mentioned was about how Dr. Gray reformulated 5 Dr. Crawford's regression to eliminate the 6 minimum fee systems. Well, he did more than 7 reformulate it. He made an entirely new 8 regression that didn't have fixed effects, that 9 didn't use subscriber groups, and his results, 10 which Dr. Gray said are similar, corroborate 11 his viewing shares, are simply nonsense. 12 Now, going back to Mr. MacLean, 13 Mr. MacLean continued in his closing argument 14 to spin these hypotheses about why the Crawford 15 regression might not actually be measuring what 16 it says it measures. And I want -- instead of 17 responding to each of them, I want to just 18 refer the Judges to our response at paragraphs 19 18 to 26 because we took them, each of these 20 sort of hypotheses, one at a time and explained 21 with record cites why they're not correct. 22 But one of the -- you know, he showed 23 this chart of the X and talked about his 24 hypothesis that low fee systems -- and he also 25 showed this religiosity map, which he was</p>	<p style="text-align: right;">4591</p> <p>1 being -- after it was pointed out that his -- 2 the variable he added to the numbers 2 through 3 6 was incorrect. 4 But even in that one, first of all, 5 the case zero, which is on that same slide that 6 Mr. MacLean showed, doesn't even match the 7 Crawford regression. Dr. Erdem was doing 8 something else but what he did in his -- his 9 next case that showed the 6 percent was to 10 replicate the royalty formula. 11 When you do that -- then he increased 12 his R squared, and when you do that, you 13 basically suck all of the variability into the 14 -- into the two very directly related variables 15 that determine the royalties, and you make it 16 impossible to determine the relative 17 contribution of the things we're interested in, 18 which are the -- which are the program 19 categories. 20 And Dr. Crawford did do a sensitivity 21 test. He looked at what -- he looked at the 22 criticism that was made in the prior proceeding 23 and he did a test to see whether there was 24 volatility across the years of his study and he 25 found that he did not, and that was reported in</p>

<p style="text-align: right;">4592</p> <p>1 his study and in his testimony. 2 Now, finally, I want to talk about 3 PTV. And given all the love that Mr. Dove has 4 given to the Crawford regression, this may seem 5 a bit strange, but we are -- we're guided by 6 the language in the '04-'05 case that I'll have 7 in a moment. 8 It talks about -- and this is at page 9 57065 of the -- of 75 Federal Register. The 10 Judges find that no single methodological 11 approach, even when ostensibly adjusted to 12 temper acknowledged shortcomings, persuasively 13 obviates the need for relying at least to some 14 small extent on other reasonable valuation 15 approaches that offer additional perspective 16 from a different methodological vantage point. 17 And we think that makes perfect sense. 18 And, in fact, the Bortz survey, which asks the 19 cable operators themselves or the buyers in 20 this marketplace, is likely to extract 21 information about other factors. You know, the 22 cable operators know what extrinsic influences 23 there might be when they -- when they provide 24 those value measures. And so from our 25 perspective, it makes perfect sense to use both</p>	<p style="text-align: right;">4594</p> <p>1 the reasonableness threshold to trigger the 2 section of the '05 determination that you just 3 quoted? 4 MR. STEWART: Yes, that's what we 5 believe. 6 And I guess one last point I'd like to 7 make is that Mr. Dove made a point of saying 8 that his proposed shares, unlike all the rest 9 of us, does not maximize his share, but I want 10 to say that, in fact, Dr. Crawford was quite 11 clear that the better version of his regression 12 was his non-duplication regression, what he 13 called his final regression. And in that -- in 14 that regression, the PTV share is somewhat 15 smaller. 16 They were clear that they were 17 recommending that he take Dr. Crawford's 18 initial regression, but the fact -- in fact, 19 the fact that duplicative network programming 20 has no value has been confirmed in the 21 testimony in this case, and we've provided 22 specific record examples. 23 Do I have any more time? 24 JUDGE BARNETT: Three minutes. 25 MR. STEWART: Do you have any</p>
<p style="text-align: right;">4593</p> <p>1 of them in this context of deciding -- 2 JUDGE STRICKLER: By both of them, you 3 mean surveys and regressions? 4 MR. STEWART: I mean the Bortz survey 5 and the Crawford regression, yes. 6 JUDGE STRICKLER: The other 7 methodological applications or approaches don't 8 fall within that general principle that you 9 just cited from the case? 10 MR. STEWART: Well, I have spoken to 11 the question of viewing, and I don't think that 12 it should be given any weight. I think with 13 respect to the Horowitz survey, which is an 14 alternative, the problem with that is it's a 15 constant sum survey, which says among these six 16 categories, or however many categories are in a 17 particular case, how do you allocate 18 100 percent. And for our category, they didn't 19 provide any details. They didn't provide any 20 examples, which means that all of the -- all of 21 the valuations and the percentages are skewed 22 in some way that we don't know. So we don't 23 think the Horowitz survey is usable either. 24 JUDGE STRICKLER: So you don't think 25 Horowitz or Dr. Gray's viewing approach meets</p>	<p style="text-align: right;">4595</p> <p>1 questions? 2 JUDGE STRICKLER: You said you 3 cross-examined Mr. Rogers? 4 (Laughter.) 5 MR. STEWART: Well, so I followed 6 Garrett. And Bob made the mistake of saying my 7 son wanted to be here today but he couldn't, 8 and then Mr. Rogers spent the next five or ten 9 minutes inquiring after the health of Bob's 10 son. 11 (Laughter.) 12 MR. GARRETT: He sent him a picture. 13 JUDGE BARNETT: So Mr. Rogers, I knew 14 because I grew up in the 50s outside 15 Pittsburgh, got his start on Commercial 16 Television. So he was there behalf of Public 17 Television, and I wanted to just say: So you 18 actually did this as well on Commercial 19 Television. 20 But I knew that if I just asked him 21 that, he'd then would keep going. So I 22 followed that question immediately with a 23 question about how Josie Carey was. And Josie 24 Carey was his sidekick on the early version of 25 the show.</p>

<p style="text-align: right;">4596</p> <p>1 So he spent the next five or ten 2 minutes telling me about how she was so sick 3 for a while, but then she moved to Arizona. 4 And I sat down. So that was that. 5 (Laughter.) 6 MR. STEWART: That's how it worked 7 out. 8 JUDGE STRICKLER: Thank you. 9 MR. STEWART: Thanks. 10 JUDGE BARNETT: Mr. Garrett? 11 I wish I had been here when Mr. Rogers 12 testified. 13 REBUTTAL ARGUMENT JOINT SPORTS CLAIMANTS 14 MR. GARRETT: I wish I had not been 15 here, Your Honor. 16 (Laughter.) 17 MR. GARRETT: It was a clear mistake 18 to have cross-examined him. 19 That's why PTV gets the ungodly large 20 share of royalties that it now gets, Your 21 Honor. 22 I really thought that I heard 23 everything I was going to hear about the 24 hypothetical marketplace during the course of 25 these hearings, but it's an issue that kept</p>	<p style="text-align: right;">4598</p> <p>1 values of each type of programming. 2 And that whole discussion was sort of 3 generated in part because of past criticisms 4 that the Bortz survey doesn't measure the 5 supply side, doesn't even take the sellers' 6 perspective into account. What they were 7 saying, no, it's really in this hypothetical 8 market, it's the demand side that's important. 9 And that's missing from the 10 description that Mr. Olaniran gave. It's 11 missing from their description of the 12 hypothetical marketplace in their proposed 13 findings. That was really the critical 14 significance of articulating what route -- what 15 the hypothetical marketplace would look like. 16 But now a real key was figuring out what the 17 demand side is. The sellers' side or supply 18 side was not as significant. 19 And I see up on his list of 20 criticisms, he still has that same criticism 21 that, well, it only measures willingness to 22 buy; it doesn't really measure the supply side. 23 That has been litigated now for decades, but in 24 the '98-'99 proceeding, they articulated that 25 marketplace, they decided it was the demand</p>
<p style="text-align: right;">4597</p> <p>1 coming up, appears to be of interest to the 2 Judges so I want to just talk a little bit 3 about that and respond to what it is that 4 Mr. Olaniran said. 5 He said that a hypothetical 6 marketplace was one where you have the 7 broadcaster acting as the intermediary between 8 the copyright owners and the cable operators. 9 And we don't disagree with that. But we also 10 don't think that that is something that was 11 said for the first time in these proceedings or 12 in the Copyright Office report that he cited. 13 Now, this goes back to the 1998-'99 14 proceeding, where -- or the CARP, which 15 articulated what this hypothetical marketplace 16 is. And it articulated in much the fashion 17 that we have spoken about it here today. It 18 didn't get into the details about advertising 19 and whether that would be available, but the 20 basic framework. And the reason it did that 21 was -- in fact, let me just read the concluding 22 sentence. It says the consequence of a 23 hypothetical marketplace structure that we 24 envisage is that the demand side -- it is the 25 demand side that would determine relative</p>	<p style="text-align: right;">4599</p> <p>1 side, and that's what gave them particular 2 confidence in relying upon Bortz. 3 So when Mr. Olaniran talks about how 4 the Bortz isn't really connected with the 5 hypothetical marketplace, that's directly 6 contrary to what the judge -- the CARP found in 7 the 1998-'99 proceeding. 8 Program Suppliers did not like that 9 finding. They appealed to the Librarian of 10 Congress. And what the Librarian -- and, 11 incidentally, that discussion in the -- of the 12 CARP report, it's here in Exhibit 6032, and 13 it's on pages 10 through 13. 14 When they appealed, the Librarian 15 rejected the challenges that the Program 16 Suppliers made and said, while this is the 17 first cable distribution CARP to describe in 18 detail its construct for determining 19 marketplace value, it is not the first time the 20 economic factors comprising the discussion of 21 the hypothetical marketplace have been 22 addressed. 23 The Bortz survey, a long-time mainstay 24 of cable distribution proceedings, has always 25 attempted to quantify how cable operators would</p>

<p style="text-align: right;">4600</p> <p>1 buy programming in a marketplace in which the 2 cable license did not exist. And it goes on to 3 say, therefore, it cannot be said the CARP in 4 this proceeding manufactured an economic theory 5 out of thin air. 6 While Program Suppliers may disagree 7 with the panel's consideration of the 8 hypothetical marketplace and, in particular, 9 the conclusion that this is the -- it is the 10 perspective of the cable operators that best 11 determines how different categories of 12 programming would work, the panel's actions are 13 based on prior decisions. 14 JUDGE STRICKLER: Now going full 15 circle to I think what I asked you this 16 morning, are you saying that that, what you 17 just read to us, what the Librarian said 18 constitutes binding precedent on us or just 19 persuasive findings of fact? 20 MR. GARRETT: This is a determination 21 that has been made. I don't think it's a 22 matter of fact. It talks about how one should 23 approach the hypothetical marketplace. And 24 unless there's actual evidence in this record 25 here, and I don't believe there is any, that</p>	<p style="text-align: right;">4602</p> <p>1 here. And he testified that, yes, in the end 2 you have to come back to what it is the cable 3 operator was looking at. That's at page 3780 4 of the transcript. 5 That's what the Bortz survey does. It 6 measures -- that's what Mr. Trautman says. It 7 really measures the demand of the cable 8 operators, and it has been doing it for a very 9 long time. 10 And that just gets me into the viewing 11 part of it here. Again, Mr. Olaniran talked 12 for 35 minutes here about viewing. But he 13 still didn't answer the fundamental question of 14 where is the record evidence that shows that 15 cable operators reflect their demand for 16 programming in these kinds of viewing numbers? 17 There is no such evidence in this proceeding 18 here. 19 JUDGE STRICKLER: Wasn't there some 20 designated testimony to that effect? I forget 21 the woman's name. About the cable systems and 22 viewing, came out of a satellite. 23 JUDGE FEDER: Toby. 24 JUDGE STRICKLER: Toby, yes. Thank 25 you. Nathan --</p>
<p style="text-align: right;">4601</p> <p>1 shows that it should be something completely 2 different, I think that's a determination that 3 that ought to be followed. 4 JUDGE STRICKLER: So you think that 5 was a principle of law that was established as 6 opposed to a principle -- a factual finding? 7 MR. GARRETT: I think it was a mixed 8 question of law and fact, is what they were -- 9 basically determined. 10 JUDGE STRICKLER: And it's your 11 position -- you're advocating that we're bound 12 by that? 13 MR. GARRETT: I never advocate to a 14 panel that they're bound by something. I think 15 that, in fact, you know, if there are 16 differences in the record, you can always, if 17 you articulate a reasoned decision, change it. 18 But I'm saying there is nothing in the record 19 here that warrants a departure of the method. 20 There's nothing that warrants a departure from 21 the notion that it is the demand of the cable 22 operator that really determines what the 23 relative marketplace value is. 24 And, in fact, Your Honor yourself 25 asked that question of Dr. Gray when he was</p>	<p style="text-align: right;">4603</p> <p>1 JUDGE FEDER: Berlin. 2 JUDGE STRICKLER: Toby Berlin. That 3 was testimony to that effect, wasn't it? 4 MR. GARRETT: I -- 5 JUDGE STRICKLER: Regardless of what 6 weight we ultimately put on it. 7 MR. GARRETT: I don't think it was 8 quantifiable, quantitative evidence that said 9 this is the same measure of the viewing. In 10 any event, Your Honor, I wasn't there in that 11 proceeding. I never had any opportunity to 12 cross-examine her or most of the other people 13 here. That was their Phase II proceeding. 14 I'm saying I'm looking at the record 15 of this proceeding here and the witnesses that 16 testified and the information that I discussed 17 earlier today, and it does not support the 18 notion that there is this one-to-one 19 correlation between viewing and value. 20 And I also don't think it's a reality 21 check. If you want a reality check, I mean, 22 this survey here is showing something like 27 23 points lower for sports than even the Horowitz 24 survey. And over 30 odd points less -- 36 25 points less than something like Bortz.</p>

4604

1 Now, there are no other studies that
2 corroborate those kinds of numbers for sports
3 that would you find. If you look at the Public
4 Television Claimants, even they will claim that
5 they should get an award that is based upon the
6 viewing here. And part of that is because it
7 is substantially above anything else that you
8 see in the record. That's the reality check.
9 The reality check is that it does not measure
10 marketplace value.

11 And as much as I love the Public
12 Television Claimants, and I do enjoy all of
13 their programming, the important thing to
14 remember with that is that on a distant signal
15 basis, they reach only 16 percent of the
16 subscribers.

17 Most all the rest of the country is
18 enjoying their programming on local channels.
19 84 percent see it only on local channels.
20 16 percent. And so when you say the viewing is
21 33 percent, that doesn't pass the reality check
22 to me.

23 And the one final point I'll mention,
24 it's just strictly if you're interested in this
25 minimum fee analysis and all that, is that, you

4605

1 know, in the Israel case, he had a control
2 variable that he used for minimum fees, and he
3 believes that that was the appropriate way to
4 deal with the minimum fee issue. That is, in
5 fact, the way that Dr. Waldfoegel dealt with the
6 issue in the 2004-'05 case.

7 And so with that, I'll thank you very
8 much for all your time and look forward to
9 seeing you again. Actually I won't. This is
10 my last one.

11 (Laughter.)

12 JUDGE BARNETT: Thank you,
13 Mr. Garrett. Truly? You won't be around the
14 next time?

15 MR. GARRETT: I certainly hope not.
16 (Laughter.)

17 JUDGE BARNETT: To all of you, thank
18 you again. This is now in our hands and out of
19 your hands. Aren't you lucky?

20 It has been a pleasure and we look
21 forward to the next phase of this proceeding.
22 We won't have everyone here for that, but I
23 know we'll see Mr. Olaniran and Mr. MacLean on
24 that happy day.

25 Well, I won't make any representations

4606

1 about when this determination will be done. We
2 have set an internal deadline, and I think the
3 statute gives us a timeline from the date of
4 the joint settlement conference report, but I
5 don't have that readily at hand.

6 But rest assured, we will meet our
7 statutory obligations. Thank you again. We
8 are now adjourned.

9 (Whereupon, at 3:35 p.m., the hearing
10 adjourned.)

4607

I N D E X	
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1 CERTIFICATE

2
3 I certify that the foregoing is a true and
4 accurate transcript, to the best of my skill and
5 ability, from my stenographic notes of this
6 proceeding.
7

8
9 4/25/18 Joe Strickland
10 Date Signature of the Court Reporter
11

12 4/25/18 Karen Brynteson
13 Date Signature of the Court Reporter
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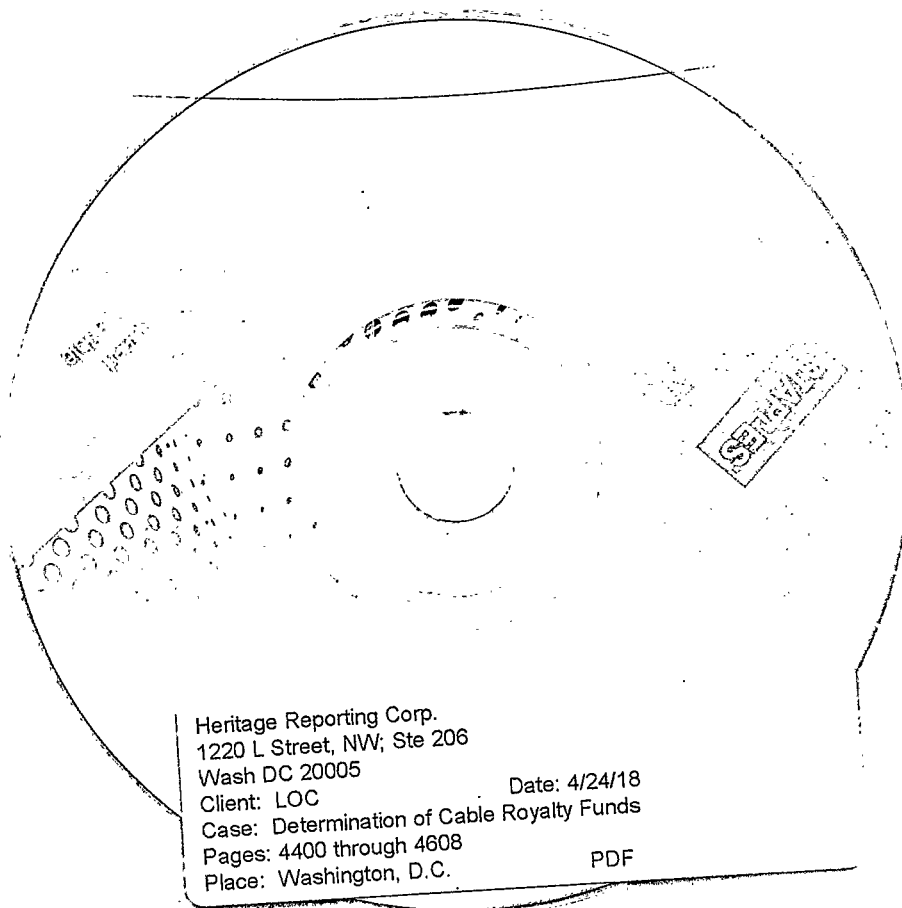
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